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Professional Writing Award for 1979

Symposium Introduction: International law

ARTICLES

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ERRATA

In the article *Official Immunity and Civil Liability for Constitutional Torts Committed by Military Commanders After Butz v Economou*, by 1LT Gail M. Burgess, USMC, published at 89 Mil. L. Rev. 25 (summer 1980), the statute discussed at page **35** and elsewhere should have been cited as 42 U.S.C. 01983, and not as 28 U.S.C. §1983.

PROFESSIONAL WRITING AWARD FOR 1979

I. INTRODUCTION

Each year, the Alumni Association of The Judge Advocate General's School, Charlottesville, Virginia, gives an award to the author of the best article published in the *Military Law Review* during the previous calendar year. The purposes of this award are to recognize outstanding scholarly achievements in military legal writing and to encourage further writing.

The award was first given for an article published in 1963, in the sixth year of the *Reuiew's* existence. It consists of a citation signed by The Judge Advocate General and an engraved plaque. Selection of a winning article is based upon the article's usefulness to judge advocates in the field, its long-term value as an addition to military legal literature, and the quality of its writing, organization, analysis, and research.[1]

II. THE AWARD FOR 1979

The award for calendar year 1979 was presented to Major Riggs L. Wilks and Major Gary L. Hopkins for their article entitled, "Use of Specifications in Federal Contracts: Is the Cure Worse than the Disease?"[2] This article was published in volume 86, fall 1979. Major Wilks is senior instructor in the Contract Law Division, The Judge Advocate General's School, Charlottesville, Virginia.[3] Major Hopkins was chief of that division when the article was published, and is now associate corporate counsel for E-Systems, Dallas, Texas.[4]

In this article, the authors discuss the various types of specifications used in government contracts and their relative merits and

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[1] A more complete account of the history of the award and a detailed description of applicable selection criteria and procedures appears at 87 Mil. L. Rev. 1 (winter 1979).

[2] 86 Mil. L. Rev. 47 (fall 1979). Presentation was made at the annual worldwide **JAG** Conference held at the **JAG** School, Charlottesville, Va., 13–17 Oct. 1980.

[3,4] For biographical information concerning the two authors up to the time of publication of their article, see the second and third starred footnotes at 86 Mil. L. Rev. 47.

weaknesses. Detailed specifications, for example, limit a contractor's discretion, giving the government more control over design antl manufacturing processes. Functional specifications, in contrast, merely direct a contractor to achieve a certain result, leaving it to him to determine the manner of doing so.

Use of detailed specifications has been attacked in recent years. It is argued by some that such specifications prevent contractors from using the latest technology, or from substituting commercially available products for specified ones. The government may in such cases spend more than is necessary for its goods and services. Functional specifications, it is said, can avoid these problems.

The authors conclude that problems encountered with detailed specifications are often based upon a lack of understanding of the purposes of such specifications. In their proper place, such as weapons manufacture, detailed specifications are more desirable than functional ones. The reverse is likely to be true for procurement of commonplace items like typewriters or automobiles.

The authors recommend that clearer guidance on selection of specifications be made available to government contracting personnel, and further that, where appropriate, discretion to make such selection be given them as well. Descriptions and lists of decisional factors are provided by the authors for use in selecting the best type of specifications for a particular contract.

The article helps greatly to clarify a complex and important area of the law which is often difficult to apply in practical situations. This type of article is especially helpful to the judge advocate or attorney advisor in field legal offices where research materials, as well as the time to utilize them, are often lacking.

111. CONCLUSION

The 1979 award is the second that has been given to more than one author. The first such instance was the 1978 award, given for an article on the Anti-Deficiency Act,[5] which was written by Major Hopkins antl Lieutenant Colonel Robert M. Nutt.[6] The 1979 award

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[5] 31 U.S.C. § 665 (1976).

[6] Hopkins and Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 Mil. L. Rev. 51 (spring 1978).

is also the second given for an article on contract or procurement law; again, the first was the 1978 award. Major Hopkins is the second person to receive the award twice.[7] Unlike most of the award-winning articles of the past eighteen years, the 1979 choice was not a graduate (advanced) class or LL.M. thesis, but was written especially for publication in the *Military Law Review*.

It is with pride and gratitude that the ***Military** Law Review* salutes Major Hopkins and Major Wilks for their achievement. Fine work such as theirs has earned for the ***Review*** and for The Judge Advocate General's School the respect of the military legal community.

[7] The first was Colonel Darrell L. Peck, JAGC, **USA** (retired).

SYMPOSIUM INTRODUCTION: INTERNATIONAL LAW

The three articles which are presented in this symposium issue all deal with various ways in which modern international law seeks to blunt the harsh effects of war. In the series of subject-matter symposia which began with volume 80 (spring 1978), this is the third volume whose subject is international law. The previous international law volumes have been volume **82** (fall **1978)** and volume **83** (winter **1979).**

The opening article concerns the neutrality of states. Under the traditional law of war, when two or more states went to war, other states were under no general obligation either to remain neutral toward the warring states, or to go to war themselves. Absent specific treaty obligations to support one side or another, states had complete freedom of choice in the matter of neutrality.

Some modern scholars have suggested that this is no longer the law, that members of the United Nations are obliged to go to war or take other action against states guilty of unlawful aggression. The author, Lieutenant Colonel Walter L. Williams, Jr., disputes this. He argues that United Nations members are obliged only to carry out orders of the Security Council, and are otherwise free to adopt a neutral stance, or else to go to war (at the risk of being characterized as aggressors themselves). The author is an Army JAGC reservist and a professor of law at the College of William and Mary, Williamsburg, Virginia.

Individuals as well as states may enjoy a kind of neutrality under international law. The Fourth Geneva Convention of **1949** specifies various civil rights of enemy civilians living in occupied territory which must be respected by the occupying power, except under certain circumstances. The analogy between states and individuals cannot be carried very far. The neutrality of a state is generally an expression of its independence; for an enemy civilian in occupied territory, neutrality may be merely an acknowledgment of his helplessness.

Lieutenant Colonel Robert W. Gehring has prepared the second article in this issue, describing the circumstances under which an

occupying power may deny civilians the protection of the Fourth Convention. If civilians engage in combat against the occupier, they lose such protection. Noncombat activity may also cause such loss if the activity is prejudicial to the national or military security of the occupying power. More difficult to apply is the third circumstance which may cause loss of protection: harm which civilians may do to the occupying power in the future.

Lieutenant Colonel Gehring is a Marine Corps judge advocate anti a past recipient of the TJAGSA Alumni Association Writing Award for an article on an international law topic published in volume 54 (fall 1971) of the *Military Law Review*.

Neutral states may often perform useful services for states at war, without compromising their neutrality. This is particularly true of humanitarian services which may be performed for civilian refugees, prisoners of war, and the sick and wounded. Captain George Peirce has written an article about the system for provision of such services which is envisioned by common Articles 8 and 10 of the four Geneva Conventions of 1949.

States at war with each other may designate a neutral third state to be their "protecting power," to look after their embassy and consular property and personnel, and to perform a variety of humanitarian and other non-political services. If the belligerents cannot agree on a third party state acceptable to both, they may avail themselves of the assistance of the International Committee of the Red Cross. Captain Peirce describes the historical origins of common Articles 8 and 10 of the 1949 Geneva Conventions, and explains how these provisions have worked in practice during the past three decades. In general, the system of protecting powers has been little used. The Red Cross has been found preferable by nations at war fearful of interference in their internal political affairs by a third-party state.

Captain Peirce is assigned to the Office of the Staff Judge Advocate, Headquarters, 1st Infantry Division, Fort Riley, Kansas. While at Harvard Law School, he studied under Professor R.R. Baxter, a leading authority on international law and presently a judge on the International Court of Justice at The Hague, Netherlands.

The *Military Law Review* is pleased to present these three fine articles on international law. They are a very worthwhile contribution to the growing body of military legal literature.

PERCIVAL D. PARK
Major, JAGC, US Army
Editor, *Military Law Review*

NEUTRALITY IN MODERN ARMED CONFLICTS: A SURVEY OF THE DEVELOPING LAW*

by Lieutenant Colonel Walter L. Williams, Jr. **

Neutrality may raise as many legal problems for states embracing it, as belligerency does for states at war. In this article the author, a professor of law at the College of William and Mary, discusses some of these problems. In particular, he considers whether states have an unlimited right to be neutral toward belligereiits under the United Nations Charter.

Traditionally, neutrality was a matter of free choice for states, subject to any treaty obligations. There was no obligation in general to remain neutral or to become a belligerent in the face of warlike actions of other states. In modern times, some scholars have suggested that the United Nations Charter and law developed thereunder

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*The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

This article has previously been published in substantially similar form under the title, *The Evolution of the Notion of Neutrality in Modern Armed Conflicts—Additional Report,* at 18 Revue de Droit Penal Militaire et de Droit de la Guerre 159–90 (1978). Professor Williams' article was one of several in various languages published by the *Revue* as part of a symposium on neutrality in armed conflict.

The *Revue*, first published in 1962, is a publication of the International Society of Military Law and the Law of War, with offices at the Palais de Justice, Brussels, Belgium. The mailing address for both the *Revue* and the Society is: A.S.B.L. Seminaire de Droit penal militaire, Palais de Justice, 1000 Bruxelles, Belgium.

For several years the United States correspondent for the Society was Lieutenant Colonel James A. Burger, deputy staff judge advocate for the 8th Infantry Division, Bad Kreuznach, Germany, 1980 to present. He was assigned to the faculty of The Judge Advocate General's School, Charlottesville, Virginia, from 1975 to 1979.

**JAGC, U.S. Army Reserve. Mobilization designee to The Judge Advocate General's School, Charlottesville, Virginia. Professor of Law, Marshall-Wythe School of Law, College of William and Mary, Williamsburg, Virginia, 1977 to present. Associated with Marshall-Wythe School of Law since 1972. On active duty in the U.S. Army Judge Advocate General's Corps, 1967–72. Associate in the law firm of Sheppard, Mullin, Richter & Hampton, Los Angeles, California, 1964–66. B.A., 1958, M.A., 1969, and LL.B., 1964, University of Southern California; LL.M. 1967, and J.S.D., 1970, Yale University. Member of the Bar of California.

have imposed on states an obligation to take sides against a state engaging in military aggression or other unlawful warlike activity.

Professor Williams concludes that in fact the law of neutrality has not changed so drastically. Member states of the United Nations have a treaty obligation to carry out orders of the Security Council, but otherwise may remain neutral if they so desire. In reaching this conclusion, the author uses the contextual method of problem solving though application of the goal-oriented decision theory developed and refined by Professors McDougal, Lasswell, and Reisman of Yale University, and other scholars. Readers of the Military Law Review were introduced to this method and its specialized vocabulary in Professor Walker's book review at 83 Mil. L. Rev. 131 (winter 1979).

I. INTRODUCTION

The thesis of this article is that, in the context of rapidly changing technological, political and legal conditions in which modern armed conflicts have occurred, the traditional rules of neutrality have in practice altered substantially. However, any *a priori* conclusion that the entire corpus of traditional neutrality law no longer operates might well be erroneous. A careful, detailed analysis of the subject is required. This article assuredly does not present the necessary definitive analysis of the many legal issues involved. Instead, it offers an impressionistic exploratory inquiry into certain major issues, seeking to encourage the broad range of research required to develop definitive analysis useful both for governmental advisors and legal scholars. The observational perspective of the writer is that of a citizen of the world community recommending to decision-makers policies reflecting community aspirations and appropriate outcomes of legal decisions calculated to implement those policies more effectively.

The methodology[1] underlying this presentation has three aspects. The first is a requirement for *comprehensive factual analysis* of

[1] A concise discussion of the methodology used in this paper is presented in McDougal, Lasswell, and Reisman, *Theories About International Law: Prologue*

any particular instance of armed conflict—an analysis that is *contextual,* viewing that conflict within the context of the existing global process of power in which states interact by various strategies to secure and maintain effective power positions in their relations. Next comes *trend analysis* of the course of decision on legal claims concerning neutrality—an analysis that, as regards past trends, properly considers the present and future effects of new conditions pertinent to the conduct of modern armed conflicts. Finally, there is need for *policy-oriented analysis* of trends of legal decision—an appraisal of trends in light of advocated world community policies seeking the maximum international peace and security reasonably attainable in this troubled world.

Only through application of such methodology may one expect to determine accurately present developments in the rules of neutrality, to project those developments into the future, and to appraise the consequences of those developments. The traditional approach to neutrality was to create a model, the "status" of neutrality. That model subsumed, *a priori,* both an hypothesized view of uniform attitude and conduct of all neutrals in all international conflict situations, and a set of contentions as to legal outcomes of decision on claims pertaining to neutrality. In turn, as this model proved unsatisfactory when imposed upon the rich diversity of reality, officials and scholars created still other models, represented by diverse terms, such as "differential neutrality'' and "nonbelligerency", to describe gradations of attitude and conduct and contentions as to resulting changes in legal outcome.2

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to a Configurative Jurisprudence, 8 Va. J. Int'l. L. 188 (1968), and in McDougal, *Jurisprudence for a Free Society,* 1 Ga. L. Rev. 1 (1966). Detailed application of this approach is illustrated in McDougal and Feliciano, *Law aiid Minimum World Public Order: The Legal Regulation of International Coercion* (1961). European readers will find a discussion in McDougal, *International Law, Power, and Policy:* **A** *Contemporary Conception,* 82 Hague Recueil des Cours 137 (1953).

2 For discussion of one or more of these terms, see 2 Oppenheim, *International Law* (7th ed., H. Lauterpacht 1952); Tucker, *The Law of War arid Neutrality at Sea* (1957); Castren, *The Present Law of War and Neutrality* (1952); Greenspan, *The Modern Law of Land Warfare* (1959); Bowett, *Self-Defense in International Law* (1958); Kelsen, *Principles of International Law* (2d ed., rev., Tucker 1967); Lawrence, *The Principles of International Law* (1895); Brownlie, *International Law aiid the Use of Force* by *States* (1963); 11 Whiteman, *Digest of International Law (1968); VII Hackworth, Digest of International Law* (1943); 2 *Wheaton's International Law* (**A.** Keith, ed., 1944); Stone, *Legal Controls of International Conflict* (1954); Komarnicki, *The Place of Neutrality in the Modern System of International Law, 80* Hague Recueil des Cours 395 (1952); Wilson, *'Non-*

The conflicting views[3] concerning the references of these terms, both factual and legal, obviously cast doubt on the value of the terms for policy and legal analysis. Also, legal literature tends to use the terms interchangeably.[4] Yet, this babel of diverse, ambiguous terminology continues in the legal literature. Attempting to work within the doctrinal confines of this diverse terminology is arguably futile. Neither the fluid reality of state attitude and conduct, nor the multiple outcomes of legal decision on varied claims as to a neutral's rights and duties in various conflict situations, can accurately be reflected in some frozen model, or series of models, represented by such terms. State officials may use such terms as crude indicators of attitude and conduct, with at least implied assertions of legality of their state's posture. However, the terminology appears useless as a departure point for legal analysis. In place of that approach, we recommend the methodology set forth above.

II. THE PROCESS OF ARMED CONFLICT

Although, in theory, a future armed conflict could occur in which all states participate directly by using military forces, the possibility is exceedingly remote, and would be a conflict in which the laws of neutrality are irrelevant. Thus, for this discussion, it is assumed that in any armed conflict certain states, varying in number, will wish not to participate by employing military forces. Indeed, envisioning the normal conflict of the reasonably forseeable future to be quite limited in the number of combatant states, the author suggests that frequently the overwhelming majority of states will wish to be "neutral."

This paper uses the term "neutral" merely to describe a state that is not an active fighting participant in the conflict. Likewise, here, the term "belligerent" merely describes a state that is employing its military forces in the conflict. State practice and scho-

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Belligerency' in Relation to the Terminology of Neutrality, 30 American Journal of International Law 121 (1941); and Kunz, *Neutrality and the European War 1939–1940*, 39 Michigan Law Review 179 (1941).

[3] *E.g.*, as regards "non-belligerency.', see Oppenheim, *supra* note 2, at 654 n.l, and Tucker, *supra* note 2, at 199 n.5.

[4] *E.g.*, Oppenheim, *supra* note **2,** at 649; Castren, *supra* note **2,** at 450–51; Stone, *supra* note 2, at 366, 404.

larly literature have used these terms to refer to widely varied conduct and attitudes, as well as subsuming varied legal outcomes. In view of such confusing references, we might better depart from the use of such terms as "neutral" and "belligerent," as we increasingly have departed from use of the term "war." These terms unfortunately continue to carry connotations both of law and fact existing in an earlier era, as well as twentieth century encrustations of competitive claims of law and policy made by state officials and scholars. **As** officials and scholars have moved to substitute the more factually descriptive term "armed conflict" for "war," we might well begin to use the terms "combatant" and "noncombatant state," or "fighting" and "nonfighting state," to reduce the risk of confusing description of conduct with legal outcomes of decision regarding permissible acts of a state as described.

To return to our discussion of the process of armed conflict, one should note that the nature of the legal claims as to the rights and duties of a neutral and of any of the belligerents will vary, depending upon the particular conflict. In large part, the appropriate application of law and policy as to those claims likewise varies. Thus, in all instances, one must analyze the factual features of the particular conflict process out of which arise claims pertaining to the laws of neutrality. We suggest the following features of the conflict process as a check list for use in comprehensively appraising relevant factors:

a. the relative power positions of the opposing sides in the conflict, and the relative power position of each belligerent side and of each neutral (or association of neutrals);

b. the nature of past relationships of each belligerent and each neutral;

c. the nature of the objectives for which each belligerent is employing military forces;

d. the geographical extent of the conflict, both in terms of the use of military forces and of the consequences (political, economic, etc.) resulting from the conflict;

e. the duration of the conflict:

f. the "crisis" level — the level of expectation that a belligerent or neutral will suffer imminent, serious loss from the conflict unless it takes avoidance action; and

g. the nature of the military weaponry employed, with emphasis on its range, accuracy, area of impact, and specialized destructive capabilities. In any particular conflict situation any or all of these features may play an important role in the attitude and conduct of each belligerent and of each neutral in their relations *inter* se, in the types of legal claims that either will raise, and in the outcome of legal decision on those claims.

Any particular armed conflict occurs within the broader context of the global power process in which states seek to increase or maintain positions of power through the use of diplomatic, ideological, economic and military strategies. Contextual conditions that may influence conduct of belligerents and neutrals, the nature of claims about this conduct, and the outcomes of decision on those claims include:

a. the continued, albeit somewhat muted global competition for power between the United States and the Soviet Union, now become a triangular competition (in some regions) with inclusion of the People's Republic of China;

b. the relationship of each belligerent and each neutral with other neutrals, raising questions of conflicting obligations and of the potential for widened participation in the conflict or the triggering of new but related conflicts, and

c. changing perspectives and practices in the conduct of armed conflict, e.g., mass mobilization of human and physical resources, elimination of the resource base of the opponent (economic warfare), and rapidly developing military technology increasingly emphasizing indirect, less discriminate modes of broad area destruction of life and property.

111. BASIC COMMUNITY POLICIES CONCERNING NEUTRALITY

Outlined here are the general world community policies involved in considering claims pertaining to neutrality. In discussing the

trends of decision on certain selected claims, we will specify policy in greater detail in appraising those trends and making recommendations for future decision.

In any modern international conflict, claims may refer to the question of whether a particular state is required by international law to participate in some manner in that conflict, i.e., to depart from what otherwise would be the requirements of the traditional laws of neutrality. This has to do with the question of each state's responsibility for supporting international public order. The overwhelming bulk of the claims, however, will refer to various aspects of interaction of belligerent and neutral. In either situation of claim, the principal community policies involved in legal decision are:

a. the widest necessary assumption of state responsibility to act for the world community in insuring that sufficient power is mobilized and used to overcome a belligerent that has resorted unlawfully to the use of armed force, and

b. the achievement of objectives for which armed force is lawfully employed with the minimum necessary consumption or destruction of human and material resources.

As to the policy of assumption of responsibility to maintain world public order, that policy may apply differently, depending upon whether the organized community has or has not determined the lawfulness of the particular use of armed force. Where the United Nations Security Council or General Assembly (e.g., the latter acting in appropriate circumstances under the "Uniting for Peace" Resolution[5]) has characterized a belligerent's conduct as unlawful, the author urges that the principle of community responsibility is applicable. This is so regardless of whether any call upon states to take some specific action is viewed as a controlling decision or as a recommendation. In either event, the characterization of a belligerent's conduct as unlawful would be authoritative, since it would be rendered on behalf of the world community under authority of the United Nations Charter.[6] Pertinent to policy as to neutrality, community policy calls for the widest necessary participation in placing

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[5] G.A. Res. 377, 5 U.N.GAOR, Supp. (No. 20) 10, U.N. Doc. A/1775 (1950).

[6] McDougal and Feliciano, *supra* note 1, at 410.

the required resources at the disposal of those acting on behalf of the community to apply sanctions against an unlawful belligerent, This obviously proposes discrimination in favor of and assistance to the belligerents acting for the community, and might take any form, from military activity to economic and other nonmilitary assistance.

However, the policy of minimum consumption or destruction of resources also applies here. Necessarily, armed force will occasionally be required to maintain public order in the world community, as in national communities. Yet, absent the extreme of all-encompassing global conflict, all states need not, and should not, participate in a conflict situation. The United Nations Charter expressly recognizes the possibility that various Member States might remain neutral in the event of United Nations action to maintain public order. Article 48 states that,

> The action required to carry out the decision of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations *or* by *some of them*, as the Security Council may determine.[7]

A guiding principle of sanctioning strategy is to terminate an unlawful use of force promptly and economically — the principle of economy in the use of force. We refer not just to the waste resulting from consumption of resources by unnecessary state involvement in conflicts. More important, perhaps, is the danger of increased destruction due to spread of the conflict because of unnecessary participation. Also, in certain instances, the concern for minimizing destruction will excuse a state from discrimination against an unlawful belligerent where that state is especially subject to destructive retaliation by an aggressor (e.g., a weak state bordering upon a much more powerful aggressor).[8]

Thus, the nature of participation by each state in community action against an aggressor, or in other community use of force, should vary, depending on that state's capabilities; the require-

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[7] Emphasis added.

[8] See Komarnicki, *supra* note 2, at 479,

ments for assistance present in the particular situation (e.g., base facilities; rights of transit; provision of supplies, or perhaps, merely diplomatic support), and other factors. Perhaps in many instances the situation will not require from the great majority of states any conduct that departs from the standards set under the laws of neutrality.

Neutrality may be useful to the world community in other respects. The situation of "permanent or perpetual neutrality"[9] of some states, such as that of Switzerland and Austria, may indeed be useful in the maintenance of public order. Generally, a state has accepted the obligation of permanent neutrality pursuant to an international agreement wherein other states agree to protect the state's territory and independence.[10] The United Nations Charter does not refer explicitly to the question of admission of a permanently neutralized State. At the 1945 San Francisco Conference on the drafting of the Charter, the view that permanent neutrality of a state would be incompatible with obligations under the Charter received much support.[11] Nevertheless, Austria was admitted to the United Nations despite its announced policy of permanent neutrality.

The permanent neutrality of a state appears to be acceptable under the United Nations Charter, if the Security Council agrees.[12] As we discussed earlier, Article 48 of the Charter authorizes the Security Council to consider the special needs of certain states.[13] A permanently neutral state may by its location serve as a "security buffer'' between other states that fear attack from each other. Further, the need for mediators, for channels of communication between opposing belligerents, for "Protecting Powers" under the 1949 Geneva Conventions for the protection of noncombatants, or

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[9] Castrén, *supra* note 2, at 449; Oppenheim, *supra* note 2, at 661; Ogley, *The Theory and Pracfice of Neutrality in the Twentieth Century* 3 (1970).

[10] Black, *et al:, Neutralization and World Politics* xi (1968).

[11] 6 U.N.C.I.O. Docs. 459–60. See Kelsen, *The Law* of *the United Nations* 94 (1951); Bowett, *supra* note 2, at 174.

[12] Verdross, *Austria's Permanent Neutrality and the United Nations Organization*, 50 Am. J. Int'l L. 61, 67 (1956); Kunz, *Austria's Permanent Neutrality*, 50 Am J. Int'l. L. 418 (1956).

[13] Lalive, *International Organizations and Neutrality*, 24 Brit. Y.B. Int'l. L. 72, 88 (1974).

for a location for negotiations, are but a few of the "infrastructure" supports assisting the cause of minimizing adverse affects of conflict and facilitating the restoration of public order that can be provided more easily by a permanently neutral state.

Regardless of the question of requiring affirmative discriminatory support from states against an aggressor state or other state that is the target of community approved military sanctions, community policy requires that, at the minimum, neutral states should not actively hinder community efforts and should not actively aid the aggressor. Even to that extent, community policy would suggest altering traditional neutrality law, since under that law certain assistance could be provided to a belligerent by a neutral, as long as the neutral offered it equally to all belligerents.

The foregoing discussion has focused on the situation where the organized community has characterized the use of force by belligerents as legal or illegal. From perspectives of community policy, what is the result if this has not occurred? On the one hand, one might argue that all states should be strictly impartial vis-a-vis the belligerents. Conflicting views could result from each state deciding for itself which side in the conflict lawfully is using force, and lead to broadened conflicts that might disrupt the still fragile United Nations Organization. A similar argument could be made concerning "regional" neutrality in the settling of a conflict between members of a regional organization such as the Organization of American States or the Organization of African Unity.)

On the other hand, the firmly established recognition of the right of collective self-defense shows that the world community already authorizes third states not only to take discriminatory action as nonparticipants in a conflict, but even to launch military forces against an aggressor, on the basis of individual state characterization of the lawfulness of each belligerent's use of force. This is so, albeit the state's characterization is provisional, and action is taken at its peril, since its conclusion is subject to the appraisal of other states, and possibly, to subsequent review by the United Nations Security Council or other agencies of the organized community.

The community policy that supports direct military participation in collective self-defense, and discriminatory action by a neutral against the belligerent characterized by the neutral as the aggressor, is the same — the common interest in maintaining international

peace and security. Although individual characterization is more subject to abuse or error, the price of foreclosing a neutral state from engaging in discriminatory conduct on that basis is the sacrifice of perhaps essential assistance in maintaining public order. Ultimately, the question concerns the risks involved in decentralized community action to maintain public order against challenges of unlawful use of force, versus the risks involved in permitting successful uses of unlawful force, including the risk of repudiating rules restraining the uses of force. These rules have been established only recently at the price of enormous human suffering and destruction of resources on a global scale. Further, it should be pointed out that in many instances of armed conflict the facts clearly will show the identity of the aggressor. Even if a situation of uncertainty calls for initial suspension of judgment, the subsequent conduct of each belligerent, e.g., the nature of announced or implicit objectives; the proportionality of use of force; efforts to achieve earliest termination of the conflict and to resort to other means of resolving disputes, and acceptance of organized community efforts to achieve settlement, should serve to clarify 'the identity of the aggressor.

If, indeed, there are instances of true uncertainty or of essentially equal fault, those exceptional cases would not justify policy foreclosing individual state action in support of international law in *all* instances. Finally, we might also comment that past experience has not indicated such a massive "rush to judgment," as is envisioned by the argument calling for impartiality of states in the absence of organized community characterization. On the contrary, in many past situations clearly calling for support in maintaining international peace and security, we have seen a lamentable failure of such support, in that all too many states prefer noninvolvement at the risk of the defeat of community interests.

IV. TRENDS OF DECISION ON SELECTED CLAIMS: APPRAISAL AND RECOMMENDATION

A. CLAIMS AS TO SHARED RESPONSIBILITY IN THE SUPPORT OF PUBLIC ORDER

A major claim concerning the present development of the rules of neutrality in modern armed conflicts concerns whether, indeed, a

state presently has the right to be impartial toward all belligerents in the conflict. Does modern customary international law, or the United Nations Charter, require states to discriminate against an unlawful belligerent? Any significant work of legal scholarship considers this claim.[14] However, we note that these writings generally pass over the problem, implicitly assuming an affirmative response to the question whether, under traditional neutrality law, a state indeed had a *right to be impartial.* Scholarly literature seems to assume that was the case, and now directs attention to the question of whether a neutral now is under a *duty of partiality.*

Proper assessment of the present trend of decision requires awareness that under traditional international law a state lawfully could resort to the use of force for whatever purpose it chose. A state permissibly could use force to defend itself or other states from prior armed attack, or otherwise to maintain its position of power, or to expand its power position at the expense, even the extinction, of other states. Since, in theory, any state lawfully could be the target of armed force, a state was *allowed* to be neutral at the sufferance of the belligerent states; *permitted* to be a nonparticipant in the conflict. Likewise, any state, even if the belligerents in a conflict were willing to allow it to be neutral, lawfully could choose to become a belligerent.

Thus, neutrality was essentially *contractual*, albeit that "offer and acceptance" normally were most implicit in any instance of neutrality. Likewise, with freedom to force a neutral at any time to become a belligerent by attacking it, or with the freedom of a neutral to become a belligerent at any time by entering its military forces in the conflict,[15] the specific conduct indulged in by any particular neutral vis-a-vis any particular belligerent might vary depending upon the triangular power relationship of the opposing belligerent sides and of the neutral. Potentially, a broad range of conduct partial to one of the opposing belligerent sides was possible in this essentially contractual process of neutrality. That a substantial amount of uniformity of expectation developed in the nineteenth

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[14] *E.g.*, McDougal and Feliciano, *supra* note 1; Oppenheim, *supra* note 2; Tucker, *supra* note 2; Castrén, *supra* note 2.

[15] Komarnicki, *supra* note 2, at 402; Orvik, *The Decline of Neutrality 1914-1941* at 28 (1971); Schwarzenberger, *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict* 573 (1968).

century as to the generally appropriate range of conduct of neutral and belligerent in their relations was due to the fairly uniform features of armed conflicts of that period: (a) quite limited objectives for the use of armed force; (b) the limited mobilization of resources; (c) the limited quantum of personal and equipment employed in actual combat; and (d) the limited extent and ambit of destruction resulting from military strategies.

Under traditional neutrality law, then, a neutral in reality had not the right, but the *duty* of impartiality (perhaps varying in extent in a particular conflict due to the actual process of interaction with opposing belligerents) that arose due to the implicit contractual basis of neutrality. This duty was the *quid pro quo* for the forbearance of belligerents from forcing the neutral to become a belligerent by attacking it: "[t]he classical and positivist conception of neutrality which developed in the seventeenth and eighteenth centuries was one of complete impartiality towards the parties to any conflict unless a treaty of alliance modified the position. The foundation of the doctrine of absolute neutrality was the absolute right of the state to resort to war."[16]

The fact that under the traditional law of neutrality a neutral did not have the right to be impartial, but rather, had a duty of impartiality, should serve to emphasize how significant would be the quantum leap in the development of international law if, today, one could conclude that under customary international law states are under the quite opposite duty of partiality against the belligerent who is the aggressor in an armed conflict. We should note that only in this century, in the lifetime of many now living, with the development of the rule prohibiting use of armed force except for self-defense or other community authorized purposes, could one say that a state had, under general international law, a right to be a neutral, and further, a right to be as impartial as it pleased toward the belligerents. The use of armed force against a state not wishing to join or assist either side of a conflict would, under the general rule prohibiting use of force, be unlawful. Implicit in the statement that the rule against unauthorized use of force exists is the assumption that, generally, a state unlawfully using force will be subject to effective sanctions, whether employed by centralized or decen-

[16] Brownlie, *supra* note 2, at 402. See also Oppenheim, *supra* note 2, at 653; Tucker, *supra* note 2 at 204.

tralized community action. A state giving assistance to an aggressor likewise would be subject to proportionate sanctions.

Thus, absent some additional fundamental change in international law, one could conclude that under customary international law each state today has a duty not to assist an agressor state, but also the right not to assist any belligerent. The question is whether the present trend of decision has moved beyond this point to reflect a still more intense development of community identifications and expectations premised on common interest, by establishing a duty of affirmative partiality — an obligation to provide affirmative assistance to those belligerents combating an unlawful disrupter of public order.

The present trend of decision is that, absent a controlling decision of the United Nations Security Council acting under Article 39 of the United Nations Charter, a state is under no duty to take a position of affirmative partiality toward either belligerent side in a conflict. Other writers[17] have in detail presented the past trend of decision starting with the Covenant of the League of Nations, then moving foward to the Pact of Paris of 1928 (the Kellogg-Briand Pact), the pre-World War II practice, the United Nations Charter, and subsequent state practice. We merely map out salient details here:

1. Covenant of the League of Nations.[18]

Under the Covenant, each member was at most required not to hinder action by others in support of the Covenant, and not to provide assistance to a state that violated the Covenant. The League Council could determine whether there had been a prohibited resort to war (Article 10), but each member was free to decide whether circumstances required it to participate in the economic or other

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[17] See, *e.g.*, authorities cited at note 14, *supra*.

[18] See discussion of the Covenant antl its effect on the laws of neutrality in McDougal antl Feliciano, *supra* note 1, at 420–22; Oppenheim, *srcpra* note 2, at 645–46; Komarnicki, *supra* note 2, at 422; Graham, *The Effect of the League of Nations Covenant on the Theory and Practice of Neutrality*, 15 Calif. L. Rev. 357 (1927); Kunz, *The Covenant of the League of Nations and Neutrality*, 29 Proc. Am. Soc. Int'l. L. 36 (1935).

sanctions recommended by the Council under Article 16 of the Covenant.[19] Thus, a member was free both to be a neutral (nonparticipant in use of force) and to be as impartial as it chose, regardless of the Council's decision.[20] In armed conflicts during the League's existence,[21] various members of the League declared neutrality and many agreements during the period provided for the possibility of neutrality in future conflicts. In the 1930's, with the acts of aggression by Italy, Japan and Germany, the expectations of League effectiveness "declined steadily until the vanishing point was reached."[22] Many states claimed neutrality as the clouds of major war grew darker, or at the outbreak of World War 11.

2. Pact of Paris.

Article 1 of the 1928 General Treaty for the Reuniciation of War as an Instrument of National Policy,[23] generally known as the Pact of Paris or the Kellogg-Briand Treaty, states:

> The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

The Pact does not refer to the concept of neutrality.[24] The International Law Association in its Budapest Articles of Interpretation

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[19] Kelsen, *supra* note 2, at 170 n.167.

[20] Oppenheim, *supra* note 2, at 646.

[21] Examples include the 1921 war between Greece and Turkey, in which the Allied Powers issued a collective declaration of neutrality; the Chaco War between Paraguay and Bolivia, in which all neighboring states, who were League members, declared their neutrality; and the Italian-Ethiopian War, in which Albania, Austria, and Hungary refused to agree with the Council's conclusion that Italy had violated the Covenant.

[22] McDougal and Feliciano, *supra* note 1, at 423.

[23] General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1938, 45 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57.

[24] Lauterpacht, *The Pact of Paris and the Budapest Articles of Interpretation*, 20 Transactions of the Grotius Society 178 (1934); Brownlie, *supra* note 2, at 403.

adopted in 1934, considered that the Pact authorized the parties to act contrary to the duties of neutrals.[25] This view has been challenged. For example, Castren maintained that the Pact of Paris "had no effect on the law of neutrality."[26] The present writer does not concur.

Assuredly, the parties to the Pact assumed no commitment to impose sanctions against one who violated the agreement. Therefore, neutrality in an armed conflict was permissible.[27] However, the Pact rejected the fundamental basis of the traditional law of neutrality, "the unrestricted right of sovereign States to go to war."[28] In establishing the *bellum justum* doctrine as a legal concept,[29] the Pact certainly expanded the permissible uses of coercion in response to unlawful use of force. Any party was authorized to determine if there had been a breach and to take action against the violator, whether as a belligerent or as a neutral taking some discriminatory action.

United States officials relied on the competence of individual league members to employ sanctions for violations of the Pact while the United States was still a neutral in the early stages of World War 11. Thus, the 1940 United Kingdom-United States "destroyers for bases" agreement[30] and the passage of the 1941 Lend Lease Act[31] were justified as permissible discrimination for violation of the Pact:

> A system of international law which can impose no penalty on a law breaker and also forbids other states to aid the victim would be self-defeating and should not help

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[25] 38 Int'l. L. Assn. Rep. 66–67 (1936).

[26] Castrén, *supra* note 2, at 432.

[27] Kelsen, *supra* note 2, at 168; Tucker, *sicpra* note 2, at 168.

[28] Oppenheim, *supra* note 2, at 643

[29] Brierly, *Some Implications of the Pact of Paris*, 10 Brit. Y.B. Int'l. L. 208, 210 (1929); Wright, *The Meaning of the Pact of Paris*, 27 Am. J. Int'l. L. 39, 61 (1933).

[30] *Official Documents: Great Britain-United States, Exchange of Naval and Air Bases for Over-Age Destroyers.* 34 Am. J. Int'l. L. Supp. 184 (1940).

[31] Act of Mar. 11, 1941, ch. 11, 55 Stat. 31.

even a little to realize mankind's hope for enduring peace.[32]

3. The United Nations Charter.

The development of the general rule prohibiting resort to armed force except for individual or collective self-defense or other community approved objectives was a fundamental step in implementing the policy of maintaining public order. The second fundamental step, at least in terms of formal authority, was the creation of the system of the United Nations Charter for centralized decision-making as to the lawfulness of the use of force, and for community coordination in the employment of the use of force and other strategies to maintain international peace and security.

Unquestionably, the United Nations, when acting, *inter alia*, under Articles 39,[33] 25,[34] and 2(5)[35] of the Charter, would have the authoritative competence to determine which states are to give assistance, and what forms of assistance are to be used to maintain international peace and security.[36] Further, under Article 53, the Security Council could call upon regional organizations to implement United Nations policies, and in turn to use regional charter authorizations. Under the Charter arrangement, then, members are free to refrain from participating in community action against an agressor only to the extent permitted by the Security Council.[37] Article 2(5)

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[32] *Statement of U.S. Attorney General to the Senate Committee on Foreign Relations in Support of the Lend Lease Act,* S. Rep. No. 45, 77th Cong., 1st Sess. 4 (1941). See Tucker, *srcpra* note 2, at 169 n.lO; McDougal and Feliciano, *supra* note 1, at 425.

[33] This article establishes the decisional power of the United Nations Security Council.

[34] In this article the member states of the United Nations commit themselves to accept and carry out Security Council decisions.

[35] This article obliges member states to give the United Nations "every assistance" in actions taken under the Charter, and to refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

[36] Greenspan, *supra* note 2, at 522.

[37] *Id.*; Oppenheim, *supra* note 2, at 647.

reinforces what already should be viewed as the duty under customary law to refrain from giving assistance to the aggressor.

The recent and continuing problem, primarily due to the global power competition of the United States and the Soviet Union, joined now by the People's Republic of China, has been that this system of centralized community characterization, direction and coordination of effort has failed to function. Fault for this failure does not rest entirely on the shoulders of the more powerful states. All states generally have been reluctant to commit military forces or other resources to support community action unless their intersts are most directly and immediately seen to be adversely affected if action is not taken.[38] The result is that even when the Security Council does act, the usual outcome is a recommendation to States, leaving to each state the discretion to support the community effort. (This is necessarily the result also under the solely recommending authority of the General Assembly.)

Thus, the outcome is now similar to that under the League of Nations, with at most a duty of passive discrimination, i.e., nonassistance to an unlawful belligerent, if so characterized by United Nations action.[39] Absent an *ad hoc* concurrence of interests of the permanent members of the Security Council, sufficient to allow a controlling decision under Article **39,** which in the foreseeable future will be a rare event, states will continue to be under no duty of affirmative partiality, to provide assistance on a discriminatory basis to states engaged in armed conflict in support of international peace and security. They will be free to be impartial toward all belligerents, or to choose on the basis of individual characterization to discriminate against the side viewed as the aggressor. State practice in the Charter period indicates that many member states have elected to continue as impartial neutrals in armed conflicts, *e.g.*, the Arab-Israeli Wars.[40] This has been the case even where there has been a community determination of aggression, but no obligatory call to action. During the United Nations involvement in Korea, many members adopted a position of impartial neutrality.[41]

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[38] See discussion and authorities cited in Williams, *Intergovernmental Military Forces and World Public Order* ch. 6 (1971).

[39] McDougal and Feliciano, *supra* note 1, at 430.

[40] Norton, *Between the Ideology and the Reality: The Shadow of the Law of Neutrality*, 17 Har. Int'l. L. J. 249, 257–261 (1976).

[41] Greenspan, *supra* note 2, at 525–26; Norton, *supra* note 40, at 265–67.

That our advocated community policy of widest assumption of necessary responsibility for maintaining world public order has been, and for the foreseeable future will continue to be, most unsatisfactorily implemented, seems a commonplace observation. Yet we must constantly reiterate to authoritative decision-makers, primarily the principal national officials, that a public order system that leaves participation in community action to terminate unlawful use of force solely to the election of each member state is fraught with the same risks that have in this century resulted in so much suffering and destruction. The author urges that national officials recognize that ultimately the maximum preservation of human values results, first, from deterrence of unlawful force and, second, from its speediest termination. Eventual effective implementation of the community policy advocated herein calls for unflagging emphasis on community identifications and common interests. Needed are prespectives that will result in acceptance of commitments to participate in community action to maintain public order, and to place claims as to neutrality, or nonparticipation, within the framework of appraisal of the requirements for maintaining international peace and security.

B. SELECTED CLAIMS ARISING OUT OF BELLIGERENT-NEUTRAL RELATIONS.

From discussion on neutrality and the claim of shared responsibility to support world public order, we turn to discussion of selected claims arising out of belligerent-neutral relations in modern armed conflicts.

1. Claims concerning neutral abstention from direct military aid to the enemy.

Traditionally, a belligerent's major area of concern as to a neutral's conduct has been whether the neutral is providing military aid to an opposing belligerent. The two principal specific claims concern: (a) providing military personnel, and (b) providing military equipment.

a. Military personnel.

Until the early nineteenth century, a neutral state permissibly could provide military personnel to either side in a conflict, as long

as the neutral offered the belligerents equal opportunity to bid for their use.[42] Many states did not maintain sufficient military forces for wartime needs, but instead hired mercenaries as the need arose. On the other hand, neutral states needed funds to maintain their military personnel, and occasions to keep up their military readiness when those states were not engaged in conflict. Thus, nondiscriminatory provision of military forces by a neutral was permissible, since it was mutually advantageous to all.

During the nineteenth century the rule changed, due in part to development of large national military forces, but also in larger part to the establishment of the European "balance of power." That regime encouraged limiting the number of state participants in a conflict, as well as limiting the objectives of resort to force, to prevent substantial imbalance within the system. By World War I, neutral state provision of military forces was impermissible.[43] In World War II, when the Spanish Government sent the "Blue Division'' (consisting of some volunteers, but primarily of regular Spanish military personnel) to serve with German forces on the Russian front, the Allied Powers protested and demanded the withdrawal of the Division. Spain did so, although some volunteers remained as a "Spanish Legion" under German military command.[44]

Reference to the "Spanish Legion" illustrates a distinction between "state action" and "private action" under traditional international law. Thus, while neutral state action in sending military forces to aid a belligerent became impermissible, private nationals or residents could join a belligerent's forces as volunteers. Article 6 of Hague Convention V[45] provides, "The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents." Underlying this state-private dichotomy was the nineteenth century

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[42] Oppenheim, *supra* note 2, at 675.

[43] 3 Hyde, *International Law* 2231–32 (2d ed. rev. 1954); Norton, *supra* note 37, at 279.

[44] Royal Institute of International Affairs, *The War and the Neutrals: Survey of International Affairs, 1939–1946* at 285, 301–02 (1956); Fox, *The Power of Small States* 160, 169, 173–74 (1969).

[45] Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540.

perspective of limited state control over persons, one aspect of the general "laissex faire concept of the relationship of citizen to state."[46]

During conflicts in this century, there have been various instances of private citizens joining the belligerents at times when their state was neutral.[47] This state-private dichotomy presents states with the opportunity to send military forces to aid a belligerent behind the facade of "volunteerism." The most blatant case of state action under claim of private action is that of the People's Republic of China sending hundreds of thousands of organized, equipped, and continuously supplied military personnel to fight the United Nations forces in Korea, yet referring to those personnel as "volunteers.[48] This claim was rejected by the General Assembly in its determination that the People's Republic of China was an aggressor in Korea.[49] Other recent instances of substantial neutral state involvement in raising, training, and financing military forces said to be volunteers have occurred.[50] Regardless of whether the individuals involved may wish to engage in the conflict (*i.e.*, whether they have "volunteered"), the relevant point is the degree of neutral state assistance in facilitating their participation in the conflict.

However, of more basic concern is whether the trend of decision in practice still honors the above-cited Article 6 of Hague Convention V which excuses the neutral state from responsibility for taking action to prevent its citizens or those otherwise subject to its con-

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[46] Norton, *supra* note 40, at 282; Stone, *supra* note 2, at 408.

[47] Examples include the Escadrille Americans in World War I, various groups in the Spanish Civil War, the "Flying Tigers" in China in the 1930's, American volunteers with Canadian and British forces in World War II before the United States' entry as a belligerent, and foreign volunteer enlistments on both sides in the Arab-Israeli War of 1948. See Norton, supra note 40, at 279–82.

[48] Statement of Mr. Wu Hsiu-Chuan, representative of the People's Republic of China, in support of Complaint of Aggression Upon the Republic of Korea, and Complaint of Armed Invasion of Taiwan (Formosa), 5 U.N. SCOR (527th mtg.) 22–23, U.N. Doc. S/p.v. 527 (1950).

[49] G.A. Res. 498(V), 5 U.N. GAOR, Supp. (No. 20A), U.N. Doc. A/1775/Add. 1, at 1 (1951). See discussion in McDougal and Feliciano, *supra* note 1, at 465-66.

[50] See discussion of the U.S.-financed participation of several thousand Thai troops in Laos in the early 1970's, during the Indochina War, in Norton, *supra* note 37, at 280–81.

trol from joining the belligerent of their choice. With the termination of the underlying condition upon which the rule was premised, i.e., the quite restrictive nineteenth century view of the ambit of state control over the individual, state support for the rule would seem greatly eroded.

Today, all governments exercise substantial control over the activities of citizens affecting the national interest, especially in the area of foreign relations. National laws quite commonly forbid joining the military forces of other countries, especially to engage in conflicts.[51] This common practice of control over citizens in areas affecting the public interest has already in other situations given rise to perspectives of increased duty of control where the state has reasonable notice of inimical acts that persons within its territory plan to take against another state, and reasonable ability to prevent them. Examples include international cooperation to deal with the narcotics trade, counterfeiting, terrorism, and aircraft hijacking.

One may suggest that the trend of decision has repudiated the "state-private" dichotomy, to the extent that a neutral state is under a duty to use reasonable efforts to prevent its citizens or others subject to its control from joining either belligerent.[52] Community policy would appear to promote this result. Traditional international law sought to balance the interest of the belligerent in military effectiveness and the interest of the neutral in avoiding deprivations in its internal or external activities due to the conflict. In effect, this was another illustration of the development of customary law pertaining to armed conflicts by balancing against each other the policies of military effectiveness and of minimal destruction of values. The object was to restrict as much as possible the scope of the conflict and the number of participants, and to promote to the greatest extent possible continued normalcy in the activities of neutrals.

Although acceptable conduct of a neutral vis-a-vis either belligerent might well vary in the particular conflict situation, most as-

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[51] Brownlie, *Volunteers and the Law of War and Neutrality*, 5 Int. and Comp. Law Q. 570, 575–79 (1956); McDougal and Feliciano, *supra* note 1, at 467–68.

[52] *Id.*; Friedmann, *The Growth qt' State Control over the Individual, and its Effects upon the Rules of International State Responsibility*, XIX Brit. Y.B. Int'l. L. 118, 137 (1938), contends for this outcome. We would submit that this is today the trend of decision.

suredly the principal expectation was that a neutral would not provide direct military aid to the enemy. The neutral was to avoid action that altered the relative positions of power of the belligerents, the military balance. Whether neutral state personnel are sent, or are permitted to depart to join belligerent forces, it would seem that some contribution to that belligerent's military position occurs, and in today's situation of pervasive control over the individual's transnational movements, this should be viewed as "state action." In view of the great size of the standing armies maintained by many states, the number of such private volunteers may seem insignificant; but, especially in wars between the smaller, less developed states, well trained foreign military personnel may be very valuable to a belligerent.

The concern of the African states about foreign military personnel, most recently displayed in the Angolan criminal trials of several mercenaries, undoubtedly is due in part to deep-seated hostilities felt toward former colonial states and toward Western society, generally, as well as to suspicion that non-African states are attempting to intervene in African affairs. However, this concern may also reflect the view that a relatively few foreign military experts could substantially alter the military balance in a conflict.

Although not actually an exception to the rules prohibiting provision of military personnel or war material, neutral states and their citizens may provide humanitarian relief assistance, *e.g.*, through their Red Cross Services,[53] without violating their obligations as neutrals.

b. Provision of War Material.

The traditional nineteenth century rule was that neutrals were forbidden from supplying, directly or indirectly, a belligerent with "war-ships, ammunition, or war material of any kind whatever."[54]

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[53] *E.g.*, Art. 27, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Art. 25, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85.

[54] Art. 6, Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, T.S. No. 545; Art. 16, Havana Convention of Maritime Neutrality, Feb. 20, 1928, 4 Hudson, *International Legislation* 2401 (1931).

Generally, also, the neutral was required to deny a belligerent the use of the neutral's public agencies and its financial, industrial and transportation facilities.[55] This requirement was seen as a vital aspect of the duty of impartiality. Similar to the "state-private" dichotomy discussed as to provision of military personnel, the neutral state was not required to prevent private citizens from supplying arms, other material assistance, or firearms. For example, Article 7 of Hague Convention XIII provides, "A neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunition, or, in general, of anything which could be of use to an army or fleet."[56]

As was mentioned above, in respect to the question of provision of military personnel, and as others have pointed out, this dichotomy resulted from "the particular conceptions of public order, or economic organization and social structure"[57] existing in Western Europe and the United States in the nineteenth century. These conceptions have altered fundamentally during this century. Especially as to state regulation of the international movement of war materiel, the trend is toward intense regulation.[58] Certainly, in those states where all or most international transfer of goods is handled by state trading organizations, any provision of material assistance to a belligerent would be "state action." However, in view of the general exercise by all states of comprehensive regulation over foreign trading, it may be said that state action is involved today in any authorization for international movement of goods. "The suggestion, most briefly put, is that responsibility must bear reasonable relation to actual control."[59]

The present trend of decision, expressed in state legislation and in practice during post-World War II conflicts, is for states who

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553 Hyde, *supra* note 43, at 2231–32; Oppenheim, *supra* note 2, at 738–45

[56] Note 54, *supra*. See also Art. 22, Havana Convention. *supra* note 54: VII Hackworth, *supra* note 2, at 610–21; Castren, *supra* note 2, at 478; Stone, *supra* note 2, at 389–90.

[57] McDougal anti Feliciano, *supra* note 1, at 438: other authorities cited *supra* note 46.

[58] Friedmann, *supra* note 52; Tucker, *supra* note 2, at 215; Norton, *supra* note 40, at 298 (citations to national legislation at n. *223).*

[59] McDougal and Feliciano, *supra* note 1, at 443.

assert neutrality to prohibit transfer of war materials by their private citizens.[60] We suggest that the developing trend of customary law is that a neutral state is under a duty to take all reasonable measures to prevent provision of materials and other assistance to a belligerent by individuals and associations under its control.

2. Claims concerning prevention of belligerent use of neutral territory to further military objectives.

Another major class of claims deals with prevention by a neutral of the belligerent's use of the neutral's territory to aid in achieving military objectives. The two principal subject matter areas covered by these claims are, first, transit of belligerent forces across neutral territory, and second, use of neutral territory for bases of operation or staging areas for launching operations, or support areas to sustain operations elsewhere. We are concerned here with activities of a belligerent within land, air and maritime territory of the neutral, which an opposing belligerent claims the neutral must prevent.

Community policies involved here are again, the policy of military effectiveness versus the policy of minimal disruption of values. The principle of effectiveness calls for prevention or termination of belligerent activities within neutral territory that adversely affect the military balance between opposing belligerents. This reduces the chances of involvement of neutral territory in armed attack by the complainant belligerent, and thus promotes minimal destruction. The deference to competency of the neutral to control conduct within its territory gives rise to expectations that the neutral will prevent improper belligerent use of the neutral's territory.

a. Transit of belligerent forces.

A traditional claim dealt with transit of belligerent forces or war materials across neutral territory. Customary law obligated the neutral to prevent such belligerent activity. This was reflected in Article 2, Hague Convention V,[61] forbidding belligerents to move convoys of "munitions of war or supplies" across neutral territory, while Article 5 of that Convention forbade neutrals from allowing

[60] See Norton, *supra* note 40, at 298 *et seq.* for survey of most recent practice.

[61] Hague Convention (V) Respecting the Rights antl Duties of Neutral Powers antl Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 340.

belligerents to perform such acts. The customary rule applies both to land and aerial transit.

This duty generally was adhered to in World Wars I and II,[62] and has continued to be asserted. For example, Ceylon refused to allow its territory to be transited to allow Indonesia to supply Pakistan in the Indo-Pakistani War of 1965.[63] The Arab League and Indonesia asserted this duty as a basis for denying transit facilities to the United Nations in the Korean War,[64] although in view of Security Council and General Assembly characterizations of actions by North Korea and the People's Republic of China as aggression, it would not appear accurate to refer to this as a duty in that instance. Denial of transit facilities to the United Nations in that case was a permissible exercise of the option not to assist military operations conducted on behalf of the community. (Note the earlier discussion of this option, above.)

During the 1973 Yom Kippur War involving Israel, Egypt, and Syria as belligerents, various states allowed their territory to be used as refueling points for United States ships and planes enroute to Israel with military equipment, or to be used for removal of materials stored there in United States bases.[65] However, after Arab states protested and stated that permission for transit of war supplies would be considered in applying an oil embargo, most NATO member states and Spain terminated their permission, relying on the traditional duty of neutrality.[66] Absent authoritative community determineation of aggression in the Yom Kippur War, each state was free to determine whether it would characterize which side was lawfully using armed force, and whether the state would choose to descriminate on the basis of its characterization, or

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[62] McDougal and Feliciano, *supra* note **1,** at **446–47,** recited some departures from the rule in World War 11, as does Norton in recent practice, *srcpra* note **37,** at **294–97,** but neither suggests that the rule has ceased *to* be operative.

[63] Rousseau, *Chroniques des faits internationaux*, 70 Revue generale de Droit international public **129, 180 (1960),** *cited* in Norton, *supra* note **40,** at **294** n. **200.**

[64] Schindler, ***Aspects*** *contemprains de In neutralite*, **121** Hague Recueil **des** Cours **221, 291 (1967).**

[65] Norton, *supra* note **40,** at **295,** reports such acts by Portugal, Italy, and Germany, citing articles in the New York Times.

[66] *Id*

continue impartially to deny military transit either by belligerents or states assisting the belligerents.

The present trend of decision regarding belligerent tranist in territorial waters is uncertain. The trend is that during conflict a neutral is not obligated to allow passage of warships under claim of right of innocent passage.[67] The neutral has competence to regulate or even prevent such passage, except in the case of straits or canals connecting high seas[68] ("international" straits or canals). The question is, what passage may a neutral permit? Article 10 of Hague Convention XIII provides that "mere passage" of a warship or prize can be authorized by a neutral, while Article 5 states that the belligerent cannot use neutral ports and waters as a "base of operation~."~~

It would appear that the neutral could permit passage that does not substantially prejudice the relative military positions of the belligerents. This would accord with the principle of military effectiveness, while recognizing the policy of minimal destruction by allowing the neutral to avoid danger of combat within its territorial waters. We must remember that the neutral was not under a duty to permit even "mere passage" of a war ship through its territorial waters. Article 10 of Hague Convention XIII provided that the neutral could authorize such passage at its option.[70] Since whether a particular passage might or might not reasonably be viewed as prejudicing the position of the opposing belligerents, depending upon the specific situation at hand, a neutral state might prefer to refuse passage in any or all cases, for increased protection from the risks of incidental damage in the course of belligerent combat, or of sanctions taken by a complainant belligerent.

The World War II case of the Altmark,[71] a German naval auxiliary vessel passing through Norwegian waters carrying British

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[67] McDougal and Feliciano, *supra* note 1, at 452 and authorities cited therein.

[68] Baxter, *Passage of Ships Through International Waterways in Time of War*, XXXI Brit. Y.B. Int'l. L. 187 (1954).

[69] Arts. 5 and 10, Hague Convention (XIII), *supra* note 54.

[70] *Id.* at art. 10.

[71] Facts are set forth in VII Hackworth, *supra* note 2, at 568–69.

prisoners of war enroute to Germany, and accompanied by Norwegian military craft, points out the real possibility of dispute. British war vessels halted the Altmark and took off the British prisoners. In answer to Norwegian protests, the British response was that only a "normal cruise" through neutral territorial waters was permissible, *i.e.*, that passage through the neutral waters had to be the reasonable route between two points, normally the most direct route, and that the Altmark had departed substantially from a reasonable route in order to use the Norwegian waters as sanctuary to avoid British attack.

In the future, in view of the high speed and enormous fire power of modern surface and subsurface naval craft, and the increased breadth of territorial waters, belligerent state attitudes will equate belligerent maritime transit with land transit as being forbidden. Also, neutral states probably will concur, due to increased risk of substantial incidental damage and of other involvement that may result if combat occurs in their territorial waters when the opposing belligerent disapproves of the neutral's permission for maritime transit and has little or no time otherwise to prevent the transit.

An exception to the duty of preventing belligerent transit has allowed transit for humanitarian purposes, to allow passage of the wounded and sick.[72] This benefits the belligerent to some extent, but the policy of minimal destruction of values — here, human life — predominates.

Discussion of belligerent use of neutral territory for base areas will be followed by consideration of the nature of the duty of the neutral to prevent belligerent transit or use of base areas, and the rights of the opposing belligerent if the neutral does not prevent these acts.

b. Belligerent use of neutral territory for base areas and other activities promoting military objecfives.

Under traditional neutrality law, a neutral was obligated to prevent use of its territory by a belligerent to establish base areas either for logistic support of operations conducted elsewhere, or for positions from which to launch attacks. As to other activities, the

[72] Art. 14. Hague Convention (V), *supra* note 61.

trend of past decision was to identify certain acts as prohibited, rather than to take a broad functional approach by prohibiting any belligerent activity in neutral territory that "augments its power to bring harm to the enemy."[73] Four aspects of this obligation have been selected for comment in the following discussion.

i. Recruiting efforts within neutral territory to obtain military manpower.

Although the customary rule was that a neutral was not obligated to prevent its citizens from joining a belligerent's forces, the neutral was required to prevent the conduct of belligerent recruiting operations on neutral territory.[74] In modern armed conflicts which generally involve substantial numbers of military personnel, this concern may not be as pertinent. However, in the case of conflicts between states having a scarcity of personnel trained in modern military technology, a belligerent's recruitment of military or other skilled personnel in neutral territory may continue to be of substantial concern to opposing belligerents. The points made in our earlier discussion concerning the duty of the neutral state not to assist in providing military personnel or material would apply here to favor continuing the prohibition against belligerent recruiting operations in neutral territory.

ii. Constructing and arming military vessels, aircraft or other equipment for use by the belligerent in military operations.

This is a classical area of prohibition, whether the work is carried out directly by the belligerent or by neutral state citizens acting as the belligerent's agents.[75] However, the prohibition was avoided by the technicality of direct purchase from private sources instead of commissioning war equipment construction.[76] It has been noted above that neutral states may now be obligated to prevent such direct private sales. The two present avoidance devices are (a) stockpiling of replacement parts purchased from a neutral or its

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[73] 3 Hyde, *sicpra* note 43, at 2249

[74] *Id.* at 2238–40; Art. 4, Hague Convention (V), *sicpra* note 61

[75] Art. 8, Hague Convention (XIII), *sicpra* note 54; McDougal and Feliciano, *supra* note 1, at 463.

[76] Oppenheim, *supra* note 2, at 714.

citizens before the conflict, and (b) establishing commitments under long-term contracts. As to the first device, it appears permissible; as to the second, it is arguable that no reasonable distinction exists between sales effected after conflict occurs and continued performance under prior long-term contracts. The same policies, discussed earlier, that support prohibition of sales also support suspension of performance under these contracts once conflict begins.

c. Use of neutral territory for communication purposes.

The traditional rule provided that the belligerent could not establish land radio stations to transmit military information, and could not use ship radios in neutral waters except for distress signals.[77] However, other means of communication existing at that time were not dealt with, such as the telegraph, land telephone, and submarine cables; and use of neutral government or privately owned radio systems was permissible.[78]

During the two World Wars the trend of decision in practice was to regard neutral states as under a duty to exercise reasonable efforts to regulate all communication systems in their territory to prevent belligerent communication of military information.[79] This modern trend recognizes the vital role of communication systems in conveying intelligence information, and in coordinating far-flung military forces.

d. Use of neutral ports by belligerent war vessels.

The traditional rule was that the neutral was under no duty either to prevent entry and stay of belligerent war vessels, or to permit it, except for distress. Therefore, the neutral could establish conditions for entry, and the time allowed for repairs, refueling and resupply.[80] This approach obviously provided opportunity for neutral assistance to the belligerents, albeit offered impartially to both sides.

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[77] Art. 3, Hague Convention (V), *supra* note til; Art. 5, Hague Convention (XIII), *supra* note 70; Art. 4(b), Havana Convention. *supra* note 54.

[78] Art. 8, Hague Convention (V), *supra* note til.

[79] McDougal anti Feliciano, *supra* note 1, at 460.

[80] Tucker, *supra* note 2, at 240.

This departure from the general principle of nonassistance to either side by the neutral (e.g., no provision of military forces or military materials, and no permission for belligerent transit or base areas) is seemingly congruent with the concept of impartiality, since access to ports, and repairs, fuel, and supplies were offered equally to each belligerent. However, the rule is subject to challenge as contrary to community policies. First, in actual operation, a belligerent may be able to control the seas, so that in fact only that belligerent could avail itself of the opportunity of using neutral ports, to the detriment of the military position of the opposing belligerent. Second, in the day of long-range strike capability against naval forces through use of aircraft, submarines and missiles, one should not expect that the opposing belligerent will be inclined to accept this detrimental use of neutral facilities any more than belligerent transit or base areas in neutral territory.

Thus, the risk exists that a neutral will become involved in combat activities, with increased ambit for destruction, if the traditional rule is applied in future conflicts. In modern warfare there is less need of neutral ports, since modern naval vessels are capable of longer cruises at higher speeds and have resupply ships. The importance to belligerents of open neutral ports may be reduced, but not to the point that access to neutral ports is seen as *de minimus*. The result may be to encourage termination of the rule of open neutral ports. **A** general rule of admission only for distress and then, internment, would appear more in keeping with those community policies, as discussed earlier.

e. Nature of the duty of the neutral to prevent unlawful belligerent use of neutral's territory.

The duty of a neutral state to prevent belligerent transit or use of base areas, and related activities, requires it to exercise reasonable effort, including use of force, to prevent improper acts by a belligerent, unless, perhaps, the belligerent's power is manifestly so overwhelming as to demonstrate futility of effort.[81] The neutral may fail to use reasonable preventive effort, or may be excused from its duty, after either reasonable but unsuccessful effort, or a showing of manifest futility of making the effort.

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[81] Oppenheim, *supra* note **2,** at 690; Hyde, *supra* note **43,** at **2336–44;** Castren, *supra* note **2,** at **440–42;** Greenspan, *supra* note **2,** at 534.

Regardless of the reasons, the neutral's failure to perform its duty authorizes the opposing belligerent to take proportionate preventive action against the unlawful belligerent activity, including action within neutral territory.[82] Where the neutral is excused from its duty to prevent the belligerent transit, conduct of the opposing belligerent may be viewed merely as the excercise of sanction against the belligerent engaging in activity in violation of the laws of neutrality. Further, if the belligerent engaging in the improper activity was the aggressor in the conflict situation, the opposing belligerent's now permissible use of force in neutral territory also would be lawful use of force in continuing self-defense[83] (or pursuant to organized community authorization).

If the neutral in fact invites or grants permission for preventive action by the opposing belligerent, the latter's action could also be viewed as in collective defense of the neutral's rights to protection against forcible intrusion into its territory by a belligerent. Where the neutral negligently fails to use reasonable efforts to prevent the unlawful belligerent transit activity in neutral territory, or indeed, intentionally permits it, preventive action of the opposing belligerent may not only be used against the belligerent activity, but also in reprisal against the neutral to cause it to adhere to its duty under the laws of neutrality.

One should note again the caveat discussed earlier in this paper, that if the neutral is supporting a belligerent engaged in collective or self-defense or other action pursuant to organized community authorization, such partiality would be permissible and counteraction impermissible. This is so because the law as to impermissible use of force now authorizes discriminatory departure from the laws of neutrality. The neutral then would be asserting a neutral's right of affirmative discrimination to oppose aggression under the modern law of neutrality, while the aggressor state would be disenabled from asserting a breach of neutrality.

A recent example of belligerent transit and use of base areas raising various issues was the use of Cambodian territory by mili-

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[82] Oppenheim, *supra* note 2, at 695 n.1; Greenspan, *supra* note 2, at 538; Castren, *supra* note 2, at 462-63.

[83] Moore, *Law and the Indo-China War* 505 (1972).

tary forces of the People's Republic of Vietnam.[84] That belligerent used the "Ho Chi Minh Trail" for years for military transit and established major base areas in Cambodia, although Cambodia had declared its neutrality in the Vietnam conflict by its domestic legislation and in formal pronouncements in the international arena.[85] One readily may grant that the Cambodian Government opposed these belligerent activities in its territory, but that any Cambodian effort to prevent them would have been futile and might have resulted in substantial destruction in Cambodia. In any event, the case is clear under international law that the opposing belligerents could in support of the laws of neutrality take proportionate action in Cambodia against the improper belligerent activities, including aerial bombing (which occurred for some years) and temporary, appropriately limited, military occupation of neutral territory (the well-known "Cambodian incursion" of 1970).[86]

3. Belligerent claims to embargo economic intercourse with the enemy.

The next category of claims we consider concerns belligerent embargo of enemy economic intercourse with neutrals. The traditional law of neutrality sought to preserve to the greatest extent possible economic intercourse between neutrals and belligerents. However, in this century two world wars have involved all-out economic warfare, with the objective of virtually halting the flow of goods from and to the opposing belligerents, and consequently, terminating their commerce with neutrals. The present trend is that a belligerent state lawfully may embargo commercial relationships of the neutral and the enemy.[87]

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[84] See Stevenson, *United States Military Action in Cambodza: Questions of International Law*, 62 Dept. of State Bull. 765 (1970); Moore, *Legal Dimensions of the Decision to Intercede in Cambodia*, 65 Am. J. Int'l. L. 1 (1971); Norton, *supra* note 40, at 283–90.

[85] Announcement of the Royal Cambodian Government, May 23, 1965, and Communique of the Cambodian Ministry of Foreign Affairs, June 12, 1965, in [1965] Annuaire francais du Droit international 1077, 1082; Norton, *supra* note 40, at 269.

[86] See authorities cited *supra* note 84.

[87] Oppenheim, *supra* note 2, at 796–97; Stone, *supra* note 2, at 508–10; McDougal and Feliciano, *supra* note 1, at 478–79.

The only issue is the reasonableness of measures used in the context of the particular conflict. The principle of minimal destruction calls for that appraisal. Questions of what goods to control, labeled "contraband," and the methods of stopping the flow of those goods, should be answered upon a contextual analysis: reasonableness under the circumstances. No a *priori* rules will provide the answers. Here, as elsewhere, if organized community authority is exercised, it is paramount.

Article 41 of the United Nations Charter provides that the Security Council may decide upon "complete or partial interruption of economic relations." In the absence of organized community decision, the rule of proportionality must provide the guide in the process of neutral-belligerent claim and counterclaim. We briefly consider the subjects of contraband and the means of halting the flow of or embargoing the enemy's economic intercourse.

a. Contraband. The traditional approach was to divide goods into three categories: absolute contraband (items specialized as to use in war); conditional contraband (items susceptible of use in war, but which might be used for other purposes, e.g., vehicles, engines, machinery); and free articles (not capable of use in war).[88] Under the traditional rules, absolute contraband destined for enemy-controlled territory could be seized; free articles could not. Conditional contraband destined for enemy-controlled territory could be seized only if consigned to the enemy government or to its military bases.[89] Parantheticallly, all enemy exports could be seized; it was only neutral exports to the belligerents that enjoyed any freedom of movement.

The modern trend of decision has been first, that the category of conditional contraband has increased enormously due to the development of military technology, and to the trend toward comprehensive national mobilization of resources for war effort. As regards the latter aspect, expansion of conditional contraband reflects community acknowledgement that governments in modern armed conflicts exercise comprehensive control over the public and private

[88] London Declaration Concerning the Laws of Naval Warfare, Feb. 26, 1909, in 2 A Collection of Neutrality Laws, Regulations and Treaties of Various Countries 1380 (Deak and Jessup eds., 1939).

[89] *Id.*, Arts. 30–31, 33–35

sectors of the economy, and allocate all resources, including food stuffs and other basic resources, in the manner best suited to support the war effort. Consequently, for both reasons stated above, the category of goods designated a *priori* as free articles has shrunk drastically. Whereas, under the 1900 Declaration of London, raw materials, foodstuffs and clothing were free articles, by World War II all were classified as conditional contraband, leaving little more than inconsequential luxury items as free articles.[90]

Ironically, any item that might now still be designated as a free article probably would be one that the opposing belligerent will not permit to be imported in any event, to conserve scarce foreign exchange! Further, the general trend during World War II and afterward has been for the belligerent to seize *all* conditional contraband, recognizing that the existence of comprehensive governmental regulation of all economic resources of the state means that, at least potentially, all conditional contraband may be devoted to the war effort.[91] In actual operation, then, almost all goods of significance in sustaining the opposing belligerent's economy may be treated the same as formally designated absolute contraband.

b. Methods of stopping the flow *of goods from and to the enemy.*

One of the traditional methods of stopping the flow of contraband to the enemy, or the flow of enemy exports, was by visit and search to identify contraband and enemy identity of exports or vessels.[92] In modern conflicts, visit and search may be highly dangerous, with stationary vessels an easy target for aircraft, submarines, surface craft, and land-based missiles. Further, with enemy property or property destined for enemy-controlled territory masked by complex corporate and fiscal arrangements and by flags of convenience, determination of enemy identity or of contraband, now and in the future, may require lengthy investigation impossible to conduct during a visit and search on the high seas. Past difficulties in this

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[90] See discussion in Norton, *supra* note **40,** at **304–06;** McDougal and Feliciano, *supra* note **1,** at **481** *et seq.*

[91] *Id.*, Stone, *supra* note **2,** at **482.**

[92] Stone, *sicpra* note **2,** at **478–91;** Tucker, *supra* note **2,** at **336–38.**

regard have already resulted in a trend toward diversion of vessel and cargo to a port for investigation.[93] The outcome is much more extensive interruption of *all* neutral trade, for the purpose of determining whether seizable property is being carried.

The second traditional method of embargoing enemy trade was the blockade. Traditionally, the requirement for an "effective" blockade[94] — a sufficiency of vessels committed to the blockade to demonstrate reasonable ability to stop the flow of enemy exports and halt contraband — rather than a symbolic "paper" blockade, had the effect of limiting the number and geographic extent of blockades. In the nineteenth century, an effective blockade required a substantial number of scarce war vessels, which were needed for combat operations as well. The result was to restrict blockades to "close-in" blockades of the most important enemy ports or other coastal areas.

Modern military technology has revolutionized blockade strategy in modern armed conflicts. On the one hand, the development of aircraft and missiles have made close-in blockades extremely dangerous; on the other hand, radar, long range aircraft and swift surface craft have reduced the need for a great number of ships to blockage a port. Further, military technology has provided mines and submarines, which can achieve effective "long distance" blockades of great areas at much less risk to the blockader.[95] However, the risk of indiscriminate destruction to neutral as well as opposing belligerent craft is much greater, even if the blockade provides assistance in guiding vessels through safe sea lanes, and so forth. Again, the result is not only more comprehensive embargo of all trade with the opposing belligerent, but substantial restriction of all neutral commerce in the general theater of the conflict.

The trend has been to recognize the legality of interdicting efforts virtually throughout the oceans, rather than merely close-in at enemy ports.[96] In fact, operationally, the most effective way to

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[93] McDougal and Feliciano, *supra* note 1, at 489.

[94] Arts. 2-3, London Declaration, *supra* note 88; Harvard Research, *Rights and Duties of Neutral Powers in Naval and Aerial War*, 33 Am. J. Int'l. L. Supp. 711 (1939).

[95] Oppenheim, *supra* note 2. at 791-92; Stone, *supra* note 2, at 508-10.

[96] McDougal and Feliciano. *sicpra* note 1, at 492-97.

achieve regulation and minimize interference with acceptable neutral shipping has been for the belligerent side exercising predominant naval power to have its officials in neutral ports provide certifications that the neutral ship is not carrying contraband ("navicerts") or enemy exports ("certificates of origin and interest").[97]

In the future, if the particular belligerents have the military capacity, we may expect continued use of indiscriminate area methods of blockade. As to the problem of control of carriage of goods by aircraft and submarine, future belligerents may seek to prohibit entirely such neutral traffic by aircraft, because of the impossibility of "visit and search," unless allowed to examine the aircraft at its point of departure. As to neutral traffic by submarines, adequate control would require surfacing and diversion to ports for inspection. In view of the great strike capability of the modern submarine, and its speed and evasive ability, the probabilities are that substantial sea areas off the coast of enemy-controlled territory and other critical areas would be closed to neutral submarines, or else entry in those areas would be permitted only if the submarine proceeds on the surface.

The outcomes of the trend of decision are that, depending upon the particular conflict, a belligerent may lawfully halt virtually all neutral commerce with the opposing belligerent, and that the methods used to embargo economic intercourse with the enemy automatically also restrict greatly *all* neutral trade in the geographic proximity of the opposing belligerent.

A modest suggestion, in keeping with the policy of balance of the objectives of military effectiveness and of minimal destruction of values, is that the principle of proportionality in using coercion should operate here, as elsewhere in the laws of war and neutrality. What is permissible in all future instances of conflict should not be judged by the situation of World Wars I and 11. In situations where the permissible objectives for the use of force are substantially more limited, it should follow that the category of goods properly designated as contraband would be more limited, and that the necessary methods of interdicting neutral commercial intercourse

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[97] 1 Medlicott, *The Economic Blockade* **94–101, 343–50, 436–42 (1952); 2** *id.* chs. 5 and 15 (1959).

with the opposing belligerent would be more limited. This would be matter for analysis in the context of the particular conflict situation, which can change through time. It must be recognized that the past trend of decision provides much room for broad discretion by belligerents.

4. Claims concerning belligerent conduct of hostile operations in neutral territory.

A state chooses to be neutral in order to avoid the destructive outcomes of armed conflict. So long as the neutral state adheres to its duties as a neutral, belligerent conduct of hostile operations in the neutral's territory would be unlawful. As noted above, if the neutral fails to prevent unlawful belligerent use of its territory, the opposing belligerent permissibly can conduct proportionate combat operations in the neutral's territory to terminate that unlawful belligerent activity. Beyond this exception, the problem of protection of neutral territory from destructive impact in future armed conflicts is posed by modern military technology.[98] Except for isolated minor instances of accidental misdirection of military firepower, neutral states in the past reasonably could expect to avoid destruction from the conflict. Their interest was in avoidance.

In future conflicts, one must acknowledge that if nuclear or bacteriological weapons are used, their destructive consequences may well be felt over wide regions, perhaps globally. Neutral states may suffer equally with belligerents. Missiles, nuclear and conventional, may go astray in neutral territory, and will be combatted by antimissile systems at the opportune moment regardless of whether that happens to be when the missile is above neutral or belligerent territory. Modern aerial and long range artillery bombardment in border areas, or modern naval conflict near neutral coasts, necessarily will damage neutral territory accidently. This was the case even during World War 11, for example, when allied bombers accidently dropped bombs on the territory of Switzerland.[99]

Even if the belligerents causing this "incidental" damage to neutral states provide compensation, neutral states may have less ex-

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[98] See discussion in McDougal and Feliciano, *supra* note 1, at 388–90, 472–73.

[99] Royal Institute of International Affairs, *supra* note 44, at 224–35.

pectation of avoidance of destructive effects in future armed conflicts. Further, depending upon the intensity of damage that is suffered by neutrals and upon the capability of belligerents causing the damage to provide compensation, there may develop a trend that the belligerent is not liable for damage that resulted unavoidably in the course of lawful, nonnegligent combat operations against the opposing belligerent, or that the belligerent causing damage in that situation is liable only to contribute compensation according to its capability.

V. CONCLUSION

In this impressionistic, highly selective survey of the developing law of neurality in modern armed conflicts, the author has emphasized, first, that accurate, useful analysis and appraisal of legal developments require a methodology entailing: (a) comprehensive and contextual factual analysis of the particular process of armed conflict and of the relations of the particular belligerents and neutrals; (b) a careful analysis of the trends of legal decision on claims concerning neutrality and of the changes in conditions upon which those trends are based; and (c) appraisal of those trends in light of advocated world community policies.

Second, our brief survey of selected trends of decision has emphasized: (a) that the laws of neutrality are indeed pertinent to community policies concerning the maintenance of international peace and security and the limitation of the destructive outcomes of armed conflict; (b) that although the development of rules limiting the use of armed force in international relations and the establishment of the United Nations Charter system have had major impact upon the traditional laws of neutrality, substantial scope exists for the developing law of neutrality to continue to operate; and (c) that modern warfare and the present world power process already have resulted in customary practice repudiating or modifying many of the traditional rules of neutrality law,

The challenge for future legal research is both to determine definitively the present trends in the laws of neutrality, and to propose to world community decision-makers recommendations for change that will assure that the modern law of neutrality promotes

the maximum achievement of the twin goals of public order and mninimal destruction from armed violence. In devoting effort to this task, legal scholars will, indeed, be serving "the interests of humanity and the ever progressive needs of civilization."[100]

[100] Preamble, Hague Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277; T.S. No. 539; Martens, 3 Nouveau recueil general de traites 461.

LOSS OF CIVILIAN PROTECTIONS UNDER THE FOURTH GENEVA CONVENTION AND PROTOCOL I*

by Lieutenant Colonel Robert W. Gehring, USMC**

In general, civilians in occupied territory are protected by international law against arbitrary action by the occupying forces. This protection is provided in part by the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, dated August 12, 1949, also called the Fourth Convention. The new Protocol I of 1977 would expand this protection.

However, international law also recognizes three sets of circumstances under which civilians may forfeit their protected status. Hostile activity by civilians during combat may lead to loss of protection. So also may non-combat activity of civilians which is prejudicial to the national or military security of the enemy occupying

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*The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the United States Marine Corps, the Department of the Navy, the Department of the Army, or any other governmental agency.

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**Station Judge Advocate, Marine Corps Air Station, Iwakuni, Japan. B.A., 1962, Harvard University; J.D. and M.I.A., 1966, Columbia University; LL.M., 1976, George Washington University. Member of the Bars of New York, the United States Court of Military Appeals, and the United States Supreme Court.

Colonel Gehring is the author of *Legal Rules Affecting Military Uses of the Seabed*, published at 54 Mil. L. Rev. 168 (1971). The article was originally written as a thesis while the author was a member of the 19th Judge Advocate Officer Advanced (Graduate) Course, at The Judge Advocate General's School, Charlottesville, Virginia, during academic year 1970–71. For this article, Colonel Gehring received the professional writing award for the year 1971 given annually by the Alumni Association of The Judge Advocate General's School. (See *Annual Professional Writing Award*, 87 Mil. L. Rev. 1 (1980).) The same article also won for Colonel Gehring the Navy Judge Advocates Writing Award For 1971, presented by the Navy League of the United States.

power. Filially, under certain restricted circumstances, the enemy power may deprive civilians of their Fourth Convention rights because of harm which the civilians may do to that power's interests in the future.

The author reviews the law on loss of civilian protections arid concludes that if represerifs a workable balance of the interests both of civilians in occupied territory, and of the occupying power.

I. INTRODUCTION

Now go arid smite Amelek, arid utterly destroy all that they have and spare fherri not; but slay both man aiid woman, infant and suckling, ox and sheep, camel and ass. I Samuel 15:3

Though Samuel specifically included noncombatants in his sanguinary advice to Saul, today's laws of armed conflict authorize deliberate destruction only of combatants and military objectives. Lawful combatants, principally members of the armed forces of a party to the conflict, may participate directly in hostilities[1] and are, in turn, lawful targets for the enemy's combatants. Noncombatants, of whom the civilian population is by far the largest group, are pro-

'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter cited as Protocol I], art. 43, official text published in International Committee of the Red Cross [hereinafter cited as ICRC], *Protocols additional to the Geneva Conventions of 12 August 1949* (19771, 72 Am. J. Int'l L. 457 (1978).

Continued experience demonstrated a need both to supplement the four Geneva Conventions of August 12, 1949, for the Protection of War Victims [hereinafter referred to collectively as the 1949 Conventions], and to modernize many of the rules regulating the actual conduct of hostilities and last committed to treaty form and ratified in the Hague Conventions of 1907. For that purpose, and following several years of preparations by the International Committee of the Red Cross and by Conferences of Experts, a Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict [hereinafter referred to as the Diplomatic Conference] was convened in 1974 in Geneva, Switzerland. The Diplomatic Conference met in additional sessions in each of the following years through 1977.

The Diplomatic Conference produced two "Protocols Additional to the Geneva Conventions of August 12, 1949," the first cited above, and a second "Relating to the Protection of Victims of Non-International Armed Conflicts," also called Pro-

tected against direct attack unrelated to a legitimate military objective.[2] A noncombatant will, however, forfeit his protection if he participates in hostilities. Impotency is the price of immunity. Hostile acts by a noncombatant do not necessarily violate the law of armed conflict, but they do legally expose him to the armed force of the enemy.

Hostile acts normally occur within active combat zones. They constitute, however, but one situation in which protections afforded civilians under the law of armed conflict may be lost. Activities prejudicial to the national or military security of the enemy, when committed within its national territory or in territory occupied by it, will also cause forfeiture of protections. Further, a civilian who has committed no hostile acts nor engaged in any prejudicial activity

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tocol 11. The Protocols were approved by the Diplomatic Conference on June 8, 1977 and annexed to the Final Act of the Conference, which was signed by way of authentication on June 10, 1977. The Protocols were opened for signature for a period of twelve months on December 12, 1977. Many of the provisions of Protocol I merely enunciate existing law in effect through custom or other conventions.

The 1949 Conventions are: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, [1955] 3 U.S.T. 3114, T.I.A.S. No. 3362 [hereinafter cited as the First Convention]; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, [1955] 3 U.S.T. 3217, T.I.A.S. No. 3363 [hereinafter cited as the Second Convention]; the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 3 U.S.T. 3316, T.I.A.S. No. 3364 [hereinafter cited as the Third Convention]; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, [1955] 3 U.S.T. 3516, T.I.A.S. No. 3365 [hereinafter cited as the Fourth Convention]. The shortened citation form for the 1949 Conventions is that used in the Protocols additional to the Geneva Conventions.

*Protocol I, art. 51, para. 2. Hereinafter references and citations to numbered paragraphs within an article of Protocol I will use a period (.), followed by the paragraph number. Hence, this citation would read "art. 51.2". See also Dep't of the Army Field Manual No. 27–10, The Law of Land Warfare, para. 25 (1956) [hereinafter referred to and cited as FM 27–10, or as the Army Manual]; Dep't of the Navy, Law of Naval Warfare, para. 221b (NWIP 10–2, 1955) [hereinafter referred to and cited as the Navy Manual]; War Office, The Law of War on Land, Being Part III of the Manual on Military Law, para. 88 (W.O. Code No. 12333, 1958) [hereinafter referred to and cited as the British Manual].

Damage suffered by civilians incidental to an attack upon a legitimate military objective may lawfully be inflicted by the attacking power so long as the damage suffered is not out of proportion to the military advantage to be gained from the attack. Protocol I, art. 57.2.

may still be denied a right whose exercise would be prejudicial to the national interests or security of his enemy.

While customary and conventional law clearly detail these three categories, their substance — the standards by which an act is denominated "hostile", an activity "prejudicial" or a national interest "threatened" — is not. Through examples drawn from the Fourth Geneva Convention of **1949** and Protocol I of **1977,** with occasional references to other conventions and to the customary law of armed conflict, this article explores these categories to aid those charged with their interpretation and implementation.

First, the foundational policies of existing law are set forth herein. Then we shall explore those provisions from the Fourth Convention and Protocol I dealing with, in turn, hostile activity by civilians during combat, activity prejudicial to national or military security, and deprivation of rights to prevent or reduce potential harm. Under each heading we shall examine the scope of unprotected activity, whether loss of rights is imposed on an individual basis or collectively, and the consequences of a loss of rights.

11. BASIC POLICIES

This section briefly explores the foundation of the law of armed conflict, the rules derived therefrom for the protection of civilians, the justification for depriving civilians of protection, and the definition of "civilian."

A. FOUNDATION OF THE LAW OF ARMED CONFLICT

Military necessity, humanity and chivalry are the traditional foundation for the law of armed conflict.[3] Those remnants of

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[3] M. McDougal & F. Feliciano, Law and Minimum World Public Order **521–22** and citations gathered at **522** n. 1.

[Editor's note: Present day doctrinal analysis in the United States Army employs different terminology. As taught in law-of-war instruction at The Judge Advocate General's School, Charlottesville, Virginia, the foundation for the law of armed conflict is built from the triad of military necessity, proportionality, and the avoidance of unnecessary suffering. The principle of humanity is roughly equivalent to the principles of proportionality and of the avoidance of unnecessary suffering.

[The principle of proportionality is discussed, for example, in the context of reprisals in Dep't of Army Pamphlet No. **27–161–2,** International Law, Volume 11,

chivalry still surviving in the modern law are largely subsumed in the other two principles and need not concern us separately.[4]

While humanity in war has often been denounced as a surrender to puerile sentimentality which actually lengthens war and increases its horrors,[5] such criticism misconceives the modern for-

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at **66-67 (1962).** The amount of force used in effecting a reprisal must be proportional to the original wrong suffered. Strict proportionality is not required, but on the other hand use of a disproportionate amount of force cannot be justified merely because it is effective in stopping the actions of the other belligerent. *Id.* Further brief discussion of the principle that "loss of life and damage to property incidental to attacks must not be out of proportion to the military advantage to be gained" appears at FM **27-10,** *supra* note **2,** para. **41,** at **19-20,** as modified by Change **1** thereto, dated **15** July **1976.** The context of this discussion is the extent to which defended and undefended places may be attacked, and to which destruction of property or facilities is permissible after surrender of a defended place. *Id.*

[The principle of avoidance of unnecessary suffering is also discussed in Dep't of Army Pamphlet No. **27-161-2,** *supra,* at **39-46,** in the context of use of weapons of various sorts. The term "unnecessary suffering" is found in Article **23c** of the Annex to Hague Convention IV **(1907)** (Hague Regulations). The phrase "aggravation of suffering" is also used in discussion of the principle, and is derived from the Declaration of St. Petersburg **(1868).** *Id.* at **40.** A short discussion of "unnecessary injury," considered to be interchangeable with "unnecessary suffering" in this context, appears at FM **27-10,** *supra* note **2,** para. **34,** at 18].

[4] M. McDougal & F. Feliciano, *supra* note **3,** at **522.**

> Chivalrous conduct, a personal rather than a state deterrent. lost its force with the passing of the aristocratic officer and his replacement during the transition period by the businessman in uniform. For a brief period in World War I it appeared that chivalrous conduct would form a basis for a new law of air warfare. However, such expections were not fulfilled.

Dep't of Army Pam. No. **27-161-2,** International Law, Vol. II, at **15 (1962).**

[5] General von Hindenburg declared: "One cannot make war in a sentimental fashion. The more pitiless the conduct of the war, the more humane it is in reality for it will run its course all the sooner." *Quoted in* **3** Adler, ***Targets in War,*** The Vietnam War and International Law **281, 293** (Falk ed. **1972).**

More recently, Che Guevara advised that "circumstances and the will to win will often oblige him [the guerrilla] to forget romantic and sportsmanlike concepts." Guevara, Guerrilla Warfare 8 **(1961).**

One of the most eloquent replies to this view was offered by historian and publicist Charles Francis Adams in an address honoring the memory of Robert E. Lee. Adams, promoted to general in the Union forces in the last stages of the Civil War, delivered this address in **1903:**

> On this point two views, I am well aware, have been taken from the beginning, and still are advocated. On the one side, it is contended that warfare should be strictly confined to combatants, and its horror and devastation brought within the narrowest limits . . . . But, on the other

mulation of humanity, which prohibits only that degree or kind of violence "not actually necessary for the purpose of war."[6] Attention is focused on its correlative, military necessity, to determine the degree and kind of force permitted belligerents in warfare. The humanity principle is not sentimental nor does it lack substantive content merely because it is not applied in isolation. It stands with military necessity as the foundation for the law of armed conflict. Neither is designed to stand alone. Rather, the two are woven into a seamless web: one prohibits what what the other does not permit.

Military necessity has been defined as that principle which

> permits a belligerent to apply only that degree and kind of regulated force, not otherwise prohibited by the laws of war, required for the partial or complete submission of

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hand, it is insisted that such a method of procedure is mere cruelty in disguise; that war at best is Hell, and that true humanity lies in exaggerating that Hell to such an extent as to make it unendurable. By so doing, it is forced to a speedy end. On this issue, I stand with Lee. Moreover, looking back over the awful past, replete with man's inhumanity to man, I insist that the verdict of history is distinct. That war is Hell at best, then make it Hell indeed, that cry is not original with us: far from it, it echoes down the ages . . . .

What was the result? Hell was indeed let loose; but so was Hate. Was the war made shorter? No! Not by an hour! It was simply made needlessly bitter, brutal, and barbarous . . . .

As an American, as an ex-soldier of the Union . . . I rejoice that no such hatred attaches to the name of Lee . . . . No more creditable order ever issued from a commanding general than that formulated and signed at Chambersburg by Robert E. Lee as, towards the end of June, 1863, he advanced on a war of invasion. "No greater disgrace," he then declared, can "befall the army and through it our whole people, than the perpetration of barbarous outrages upon the innocent and defenceless. Such proceedings not only disgrace the perpetrators and all connected with them, but are subversive of the discipline and efficiency of the army, and destructive of the ends of our movement . . . ." He at least, though a Confederate in arms, was still an American, and not a Tilly or Melac.

"War is Hell," address by Charles Francis Adams, 13th Annual Dinner of the Confederate Veterans' Camp of New York, Jan. 26, 1903, *quoted in* 1 Taylor, Foreword, The Law of War at xiii, xx (L. Friedmann ed. 1972).

[6] FM **27-10,** *supra* note 2, at para. 4b (1940 ed.), quoted at 10 M. Whiteman, Digest of International Law 299 (1968). The Navy Manual, *supra* note 2, states:

> The principle of humanity prohibits the employment of any kind or degree of force not necessary for the purpose of the war, i.e., for the par-

> the enemy with the least possible expenditure of time, life and physical resources.[7]

Two common elements shared by most formulations of military necessity are (1) a compelling requirement for the military actions in question to be taken if the war objectives (the submission of the enemy in modern formulations) are to be achieved,[8] and (2) recognition that the rules of armed conflict prohibit some forms of military

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> tial or complete submission of the enemy with the least possible expenditure of time, life, and physical resources.

Id., para. 220b.

The British Manual, *supra* note 2, states: "The principle of humanity [is that] kinds and degrees of violence which are not necessary for the purpose of war are not permitted to a belligerent; . . . ." *Id.*, at para. 3.

[7] Navy Manual, *supra* note 2, para. 220a. This modern formulation is not a twentieth century innovation. Very similar terminology appeared in 1863:

> Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispendable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, art. 14 [hereinafter cited as Lieber Code], in The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents 3, 6 (D. Schindler and J. Toman eds., 1973). An interesting sketch of Dr. Francis Lieber, the chief compiler of General Orders No. 100, appears at Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field*, 1 Am. J. Int'l L. 13 (1907). A brief sketch of Dr. Lieber's life is presented also at 27 Mil. L. Rev. 2 (1965).

An equivalent passage from the Army Manual, FM 27-10, *supra* note 2, defines military necessity as "that principle which justifies those measures not forbidden by international law which are indispensable for the complete submission of the enemy as soon as possible." *Id.*, para. 3a. The British Manual, *supra* note 2, defines military necessity as "the principle that a belligerent is justified in applying compulsion and force of any kind, to the extent necessary for the realization of the purpose of war, that is, the complete submission of the enemy at the earliest possible moment with the least possible expenditure of men, resources, and money . . . ." *Id.*, 3.

[8] The phrasing of this compelling requirement varies from author to author. One may use such terms as "urgent need, admitting of no delay." Downey, *The Law of War and Military Necessity*, 47 Am. J. Int'l L. 251, 254 (1953). Another may say "immediately indispensable." O'Brien, *Legitimate Military Necessity in Nuclear War*, II Y.B. Of World Polity 35, 46-49, 67 (1960), quoted in 10 Whiteman, *supra* note 6, at 316. Still others may be satisfied with an unqualified "indispensable," one of several definitions of military necessity found in Dunbar, *Military Necessity in War Crimes Trials*, 29 Brit. Y.B. Int'l L. 442-46 (1952), quoted in 10 Whiteman, *id.* at 308; or merely "necessary" and "prompt realization," as in McDougal & Feliciano, *supra* note 3, at 72.

action even in the face of a compelling requirement. Implied by the first element are the additional criteria that the kind and degree of force used must be relevant and proportionate to the end sought[9] or the need for the force used will not be compelling.[10]

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[9] McDougal states that military necessity authorizes "such destruction, and only such destruction, as is necessary, relevant, and proportionate to the prompt realization of legitimate belligerent objectives." McDougal and Feliciano, *srcpra* note **3,** at **72.** O'Brien, *supra* note 8, states:

> Military necessity consists in all measures immediately indispensable and proportionate to a legitimate military end, provided that they are not prohibited by the laws of war or the natural law, when taken on the decision of a responsible commander, subject to judicial review.

Both writers also note the breadth of actions permitted if necessity, relevancy and proportionality are tied only to the "complete submission of the enemy." Thus, McDougal and Feliciano refer to "legitimate belligerent objectives" and spell out an analytical framework by which their legitimacy is to be determined. O'Brien also refers to a "legitimate military end . . . ."

[Editor's note: It should be noted that present day doctrinal analysis in the U.S. Army regards proportionality not merely as derived from or implicit in the doctrine of military necessity, but as one leg of the triad foundation for the law of armed conflict. See editor's note at note **3,** *sicpra.]*

[10] This point was vividly expressed during the Nuremberg trials:

> Military necessity has been invoked by the defendants as justifying the killing of innocent members of the population and the destruction of villages and towns in the occupied territory. Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces . . . . It does not admit the wanton devastation of a district or the willful infliction of suffering upon its inhabitants for the sake of suffering alone.

The Hostages Case (United States v. List), XI Law Reports of Trials of War Criminals **1253–54** (1950), quoted in **10** Whiteman, *srcpra* note 6, at **301.** There is a striking similarity between the words of the International Military Tribunal at Nuremberg and the words of the Lieber Code written almost a century earlier:

> Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally

The second element rejects the occasional argument that military necessity, in stringent circumstances, authorizes an inherent exception to otherwise absolutely phrased prohibitions contained in the law of armed conflict.[11] This subordination of the compelling requirement to absolutely phrased prohibitions transforms the doctrine of military necessity from mere repetition of the strategic

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> *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

Art. 15 [italics in original],

> Military necessity does not admit of cruelty — that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

Art. 16.

[11] Under the German doctrine of *Kriegraison*, the rules of prohibition assertedly were not obligatory "when the circumstances are such that the attainment of the object of the war and the escape from extreme danger would be hindered by observing the limitations imposed by the laws of war." 4 F. Von Holtzendorff, Handbuch des Volkerrechts 255 (1889), *quoted in* II J. Westlake, International Law 126 (2d ed. 1913). See also citations in II L. Oppenheim, International Law 231 n.6 (7th ed. 1952).

This contention should have been laid to rest during the war crimes trials following World War II:

> It is an essence of war that one or the other side must lose and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly — and at the sole discretion of any one belligerent — disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.

The Krupp Trial, X *Trials*, *supra* note 10, at 139, quoted at 10 Whiteman, *supra* note 6, at 302. The Army Manual, FM 27-10, *supra* note 2, indicates: "Military

principle of economy of force into a foundation for law. It is not the purpose of the law of armed conflict to permit all violence necessary to achieve success under any set of circumstances. As stated in the Hague Regulations of 1907, "The right of belligerents to adopt means of injuring the enemy is not unlimited."[12]

B. PROTECTION OF CIVILIANS

One level of generalization below the principles of humanity and military necessity is the "generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them."[13] This rule logically flows from the principles of humanity and military necessity. While a hostile civilian population may represent a source of manpower and material resources for opposition, the immediacy of such a threat (except when represented by recruit training depots, supply dumps and manufacturing plants) cannot compare with that represented by the opposing military force. Similarly, once that military force is overcome, its supporting civilian population can be controlled without the destruction inherent in further military attacks. Thus, attacks upon the civilian population *per* se are not a compelling requirement for defeat of the enemy.

While World War II strategy severely challenged this theory,[14] a fact recognized in legal writing during and immediately following

necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity." *Id.*, para. 3a.

[12] Regulations Respecting the Laws and Customs of War on Land, Annex to the Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 22, 36 Stat. 2277, T.S. No. 539. Very similar language is repeated in article 35.1 of Protocol I.

[13] Army Manual, FM 27-10, *supra* note 2, and other citations gathered in note 2.

[14] Of course, the challenge by no means originated with World War II. "Bringing home the war to the enemy" so that the civilian population would pressure their leaders to surrender was the policy of General William T. Sherman during the American Civil War:

> I attach more importance to these deep incisions into the enemy's country, because this war differs from European wars in this particular;

> we are not only fighting hostile armies, but a hostile people, and must make old and young, rich and poor, feel the hard hand of war, as well as their organized armies. I know that this recent movement of mine through Georgia has had a wonderful effect in this respect. Thousands who have been deceived by their lying newspapers to believe that we were being whipped all the time now realize the truth, and have no appetite for a repetition of the same experience.

Letter to Major General Henry W. Halleck on Dec. 24, 1864, *quoted in* P. Bordwell, The Law of War Between Belligerents 79 (1908).

Similar words were spoken by General Franklin Bell at the turn of the century in the Philippines: "It is necessary to make the state of war as insupportable as possible . . . by keeping the minds of the people in such a state of anxiety. . . that living under such conditions will soon become unbearable." *Quoted* by N. Leites & C. Wolf, Jr., Rebellion and Authority: An Analytic Essay on Insurgent Conflicts 97 (1970).

During World War II, the size of the conflicting forces, the life or death nature of the struggle, the organization of entire nations to support their respective military forces and their concomitant vulnerability to blockade and contraband practices, the compelling need to weaken the enemy's armed forces before battle and interdict them from supplies and reinforcement during battle, the assumed interrelationship between governmental policy and civilian morale, and the availability of airpower to pursue these ends on a scale hitherto unimagined, strained the principle of civilian immunity to the utmost. For example, the British Directive of October 29, 1942, on air warfare, after spelling out various measures to avoid undue loss of civilian life in the vicinity of military targets, concluded that:

> [N]one of the foregoing rules should apply in the conduct of air warfare against German, Italian, or Japanese territory, except that the provisions of the Red Cross Conventions were still to be observed, for "consequent upon the enemy's adoption of a campaign of unrestricted air warfare, the Cabinet have authorized a bombing policy which includes the attack on enemy morale . . . ."

Quoted at 2 W. Craven, The Army Air Forces in World War II 240, and reproduced in ICRC, Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War 163 (1956) Submitted to the XIX Int'l Red Cross Conference, New Delhi, January 1957.

Sometimes it may appear that the opposing armed force can most effectively be weakened by indiscriminate attack upon the supporting civilians to destroy their morale. This is nothing more, in reality, than at attempt to isolate the armed forces from their support. Once this objective is understood, a different set of targets than indiscriminate attacks upon population centers will be chosen to enable concentration of force upon a particular objective, in accord with strategic principles. Attacks will be made upon transportation and communication centers, stockpiles of supplies, production facilities for war materiel — all targets which can be attacked more efficiently and effectively than civilian morale. See authorities cited in note 16 *infra*.

the war,[15] subsequent analysis reaffirmed its validity.[16] Rather than destroying the legal distinction between military and civilians in targeting, World War II proved the need for additional protections for civilians.[17] Progress has been slowest in regulating actual combat. For example, the Fourth Convention contains only a few provisions drafted specifically to protect civilians or civilian institutions during combat operations.[18] A major part of Protocol I, how-

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ls Writing in **1945,** one author referred to the "inviolability or immunity of civilians from the effects of military operations" as an "irrational and sentimental popular opinion" whose rational significance had been greatly weakened, if not entirely destroyed, by the conditions of modern warfare. "[I]t has become logical to bring pressure to bear on the civilian population in order that they may induce the government to yield." As well, the civilians are a legitimate target because "practically every phase of national activity contributes to the support and success of modern war." Stowell, The Laws of War and the Atomic Bomb, **39** Am. J. Int'l L. **784, 785 (1945).**

While not arguing that the civilian population was yet a legitimate target, another writer asserted that the civilian-military distinction had been "so whittled down by the demands of military necessity that it has become more apparent than real." After lengthy analysis, he concluded:

> How then is the noncombatant immune from attack? He is legally subject to almost unrestricted artillery and naval bombardment. If he lives in a besieged locality, he may legally be starved or bombed. If he lives in a country which does not grow enough food to support its population, a blockade can legally starve him to death. If he lives in an important city, he is subject to bomb and robot attack of the most catastrophic nature True, in many cases, he may not be the intended subject of attack, but under modern methods of waging war that gives him little protection. Where does this leave the "fundamental" doctrine that a noncombatant is relatively immune from attack?

Nurick, The Distinction Between Combatant and Noncombatant in the Law of War, **39** Am. J. Int'l L. at **680, 696 (1945).**

[16] World War II area bombing in populated areas has been severely criticized for several reasons, including its strengthening of the enemy's resistance:

> Area attacks while perhaps justifiable as retaliation, were a complete violation of the principles of war strategically. They vitiated forces rather than concentrating them against the decisive point, they were uneconomical of force, and they strengthened the enemy will to resist . . . .

R. Higham, Air Power: A Concise History **132 (1972).** Also see U.S. Strategic Bombing Survey, Overall Report (European War) **108,** para. **4 (1945).**

[17] Note that the British Directive, quoted in note **14** *supra*, even though setting a different standard for bombing enemy territory than for occupied territory of allies, still required compliance with the Red Cross Conventions.

[18] Fourth Convention. arts. **14–22.**

ever, is designed to achieve this goal. Similar progress is also evident in the municipal orders regulating armed forces.[19]

Much more rapid progress was made in extending protections for civilians in the power of their enemy during occupation of their homeland. The definition of "war crimes" used in prosecutions after World War II included "murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory . . . ."[20] The 1949 Conventions vastly expanded the protections afforded the victims of war, those left in the wake of combat operations, and civilians in occupied territory or stranded in the enemy's territory at the outbreak of war.

Such concern for civilians is strongly supported by the principles of humanity and military necessity. If military necessity cannot justify targeting civilians during combat, far less can it justify violence wrought upon civilians stranded in enemy territory, residing in occupied territory or captured during combat operations. During combat the imperative of overcoming the adversary's armed forces, while not permitting direct attack upon civilians, does permit considerable incidental damage to civilians in the vicinity of military objectives. Away from the scene of battle, however, the imperative demands of combat are replaced by more prosaic concerns such as efficient administration of occupied territory and security of one's armed forces. Before executing punitive measures, there is time for

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[19] Some good examples may be drawn from U.S. Military Assistance Command, Vietnam, Directive No. 525–13, Rules of Engagement for the Employment of Firepower in the Republic of Vietnam (May 1971). Para. 6a of that directive required that "all possible means . . . be employed to limit the risk to lives and property of friendly forces and civilians. In this respect, a target must be clearly identified as hostile prior to making a decision to place fire on it." Several annexes to the directive provide more detailed implementing rules for specific types of weapons.

[20] The complete definition was as follows:

> (b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, illtreatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or illtreatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

Charter of the International Military Tribunal, Aug. 8, 1945, art. 6b, 59 Stat. 1544, *reprinted ut* Friedmann, *supra* note 7, at 885, 887; *also at* 41 Am. J. Int'l L. 172, 174 (1947).

due process and consideration of individual culpability. There is no compelling requirement for the destruction of life and property, at least not without granting minimal legal procedural rights.[21]

C. *LOSS OF PROTECTION*

The civilian must refrain from combat. This rule too flows from the principles of humanity and military necessity. There is no compelling requirement to attack the civilian because he represents no physical threat. But if he takes his rifle down from the wall and comes out his door shooting, he forfeits his legal protection and may be attacked as may any group of uniformed or armed men. Still more important, his act threatens the privileged status of other civilians as the jittery soldiers of the enemy become apprehensive of all civilians. A civilian who commits some act of violence permitted a uniformed soldier forfeits his legal protection, and, if captured, is liable to punishment by his captor.[22]

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[21] See the Fourth Convention, art. 71. The Lieber Code of 1863 insisted that "the unarmed citizen is to be spared in person, property and honor as much as the exigencies of war will admit" (art. 22) and that "protection of the inoffensive citizens of the hostile country is the rule; privation and disturbance of private relations are the exceptions." (art. 25). In a postwar discussion of occupation practices, Lauterpacht indicated that "such private subjects [of belligerent states] as do not directly or indirectly belong to the armed forces . . . ought to be safe as regards their life and liberty, provided they behave peacefully and loyally . . ." II Oppenheim. *supra* note 11, sec. 57. The British Manual insists that "Civilian inhabitants . . . may not be killed or wounded, nor as a rule taken prisoner." Para. 88.

A recent implementation of the rule may be found in the U.S. Military Assistance Command, Vietnam, directive concerning the screening of detainees, i.e., persons who have been detained but whose final status has not yet been determined. This directive provided for their release and return to the place of capture if they were determined to be innocent civilians. MACV Directive No. 381-46, Dec. 27, 1967, Annex A, para. 5.a(4).

[22]

> It is one of the purposes of the laws of war to ensure that an individual who belongs to one class or the other [military or civilian] shall not be permitted to enjoy the privileges of both. Thus he may not be allowed to kill or wound members of the army of the opposing belligerent and subsequently, if captured, to claim that he is a peaceful civilian.

British Manual, para. 86. The Navy Manual also conditions the safeguarding of civilians from injury not incidental to military operations upon their refraining "from the commission of all acts of hostility . . . ." Para. 221b.

Today a trial is required before punishment after capture. Fourth Convention. art. 71. This was not always so.

> Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without com-

International law also permits criminal punishment for civilians who, in the territory of the enemy power or in occupied territory, commit acts prejudicial to the security of the territorial or occupying power.[23] Of course, punishment of a civilian for hostile acts committed during battle, in the enemy's territory or in occupied territory, can only be administered after a trial providing essential minimum procedural safeguards.[24] Once a civilian is captured, his hostile acts cease. No longer is there any compelling requirement for immediate action; his submission has been achieved. Punishment for his past acts is not a question of military necessity, but of retribution, future protection of his captor, and deterrence of others from similar harmful acts. These are the motivations in any criminal justice system. Hence, the erring civilian must be granted those procedural rights considered essential in a criminal justice system.[25]

> mission, without being part and portion of the organized army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers — such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

Lieber Code, art. 82.

The civilian has not "violated" the law of war; he has committed no "war crime." But his acts do expose him to the retributive power of the enemy if captured. Unlike the soldier under the law of armed conflict, the civilian is not "privileged" to wreak death and destruction. See Baxter, *So-Called 'Unprivileged Belligerency: Spies, Guerrillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323 (1951).

[23] [I]nternational law permits a belligerent occupant to prohibit and punish, but does not itself prohibit conduct by the inhabitants of occupied areas which is hostile to him or which is inconsistent with the security of his forces or administration.

Baxter, *The Duty of Obedience to the Belligerent Occupant*, 27 Brit. Y.B. Int'l L. 235, 266 (1950). See also the Fourth Convention, arts. **64,** 68.

[24] Fourth Convention. art. 71

[25] An incident of the nineteenth century normally considered to exemplify necessity in the law of self-defense is relevant here as well. In 1873 the *Virginius* was seized by Spanish authorities on the high seas while headed for Cuba with men and arms to support an insurrection. Fifty-three of the crew and passengers were summarily tried by court-martial on charges of piracy and shot before a British warship arrived, halting the proceedings. Both the United States (the state of registry of the *Virginius*) and Great Britain, some of whose subjects were among those summarily tried, protested.

Of particular interest were the grounds asserted by the British, who did not contest the right of Spain to seize the *Virginius* on the high seas nor to detain the

Finally, even when no act violating any criminal statute or regulation has been committed, international law still permits a belligerent to deny certain enemy nationals the rights granted them by international law if those particular civilians possess a greater potential for harm than others.

Thus under international law there are three circumstances under which civilians may lose their protected status. Examples of all three will be drawn from the Fourth Convention and Protocol I in the following discussion.

D. DEFINITION OF CIVILIAN

Before proceeding further we must define "civilian," at least as that term is understood in the Fourth Convention and Protocol I. The Fourth Convention defines by exclusion while Protocol I proceeds by residuum.

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personnel. The British protested only the summary trial given the British subjects, arguing that, once they were seized, there was no longer any imminent necessity, and that regular trial proceedings, rather than summary proceedings, would have sufficed to prosecute any violations of law that had occurred. II J. Moore, Digest of International Law, sec. 309, at 895–903; Gehring, Defense *Against Insurgents on the* High *Seas,* 27 JAG J. 317, 336–37 (1973).

An equally fine summary of the law of war distinguishing between actions permitted with regard to enemy forces and the limitations on treatment of captured personnel, both military and civilian, may be found in the military judge's instructions in the general court-martial, United States v. Calley:

> The conduct of warfare is not wholly unregulated by law. Nations have agreed to treaties limiting warfare; and customary practices governing warfare have, over a period of time, become recognized by law as binding on the conduct of warfare. Some of these deal with the propriety of killing during war. The killing of resisting or fleeing enemy forces is generally recognized as a justifiable act of war, and you may consider any such killing justifiable in this case. The law attempts to protect those persons not actually engaging in warfare, however; and limits the circumstances under which their lives may be taken.
>
> Both combatants captured by and noncombatants detained by the opposing force, regardless of their loyalties, political views, or prior acts, have the right to be treated as prisoners until released, confined, or executed, in accordance with law and established procedures, by competent authority sitting in judgment of such detained or captured individuals. Summary execution of detainees or prisoners is forbidden by law.

From instructions of the Military Judge to the court members in United States v. Calley, II Friedmann, *supra* note 5, at 1703, 1721. The quoted instructions were not discussed by the Court of Military Appeals in its two decisions concerning the *Calley* case, at 46 C.M.R. 1131 and 48 C.M.R. 19 (1973).

"Civilian" is found but rarely in the Fourth Convention, which rather addresses "protected persons." Article 4 defines "persons protected by the Convention" as those "who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." The article then excludes from protected status nationals of states not bound by the Convention, nationals of a neutral or co-belligerent state found in the territory of a belligerent state while their state has diplomatic relations with the state in whose power they are, and persons protected by any of the other 1949 Conventions.[26] While stateless persons are not specifically addressed in article 4, there is some fear that the emphasis on being a national of a state bound by the Convention excludes those lacking nationality.[27]

Those protected under the Fourth Convention, then, are belligerent nationals who fall into the hands of their enemy, as well as neutral and co-belligerent nationals whose own state lacks diplomatic representation in the state in whose hands they are, assuming in each case the individual is not protected under any of the first three 1949 Conventions.

Protocol I adopts a much more comprehensive definition and follows the combatant-noncombatant distinction of customary international law. Article 50.1 defines a civilian as "any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol."[28] Nationality or its lack excludes no one from the civilian protections of Protocol I.[29]

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[26] This affects primarily those eligible for prisoner of war status under the Third Convention.

One noted commentator finds that neutral nationals are protected when in occupied territory even if their state has diplomatic representation in the state in whose power they are. IV J. Pictet, The Geneva Conventions of 12 August 1949: Commentary 48-49 (1958). The present writer finds nothing in the language of article 4, however, which limits the exclusion from protection to cases in which the neutral national is within the national territory of his captor.

[27] This question is resolved in Protocol I, art. 73, which specifically makes stateless persons and refugees protected persons under the Fourth Convention.

[28] Those paragraphs mentioned from the Third Convention set forth a nonexhaustive list of combatants entitled to prisoner of war status under the Third Convention. Art. 43 of Protocol I defines "armed forces."

[29] There was disagreement, however, whether a Party's own nationals should be protected by art. 75. Report of the United States Delegation to the Diplomatic

III. HOSTILE ACTIVITY BY CIVILIANS DURING COMBAT

A. PARTICIPATION IN HOSTILITIES

1. Scope of unprotected activity

a. Fourth Convention

The Fourth Convention was intended to protect civilians not from the dangers of military operations but from the very different risks posed by arbitrary enemy action outside the zone of military operation.[30] Participation in hostilities is mentioned but twice in that Convention,[31] and no definition of the concept is suggested in the Acts of the 1949 Diplomatic Conference.[32] This silence could evi-

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Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Fourth Session at 28 (Geneva, Switzerland, Mar. 17–June 10, 1977) (draft) [hereinafter referred to and cited as 1977 Draft Delegation Report].

[30] IV J. Pictet, *supra* note 26, 10–11. The only exception is when military operations might directly impinge on victims otherwise protected; e.g., persons and property covered by the special protections for hospitals, medical personnel and medical transports in articles 13–26.

[31]

> Art. 3.(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> Art. 15. Any Party to the conflict may, either direct or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:
>
> (a) wounded and sick combatants or noncombatants;
>
> (b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

[32] ICRC, Protection of the Civilian Population Against Dangers of Hostilities, at 22 (Document CE/3b submitted to the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May–12 June 1971).

dence a general consensus as to the substance of existing customary law, satisfaction therewith, and a belief that no change was made by the language chosen for the Convention. But the legal literature before and after that date seldom discussed the scope of activity unprotected.[33]

Certainly the civilian cannot shoot a passing enemy soldier, secrete a bomb in the enemy encampment, or otherwise directly and intentionally harm his enemy. The Army Manual, Field Manual No. 27–10, The Law of Land Warfare, lists, nonexhaustively, additional "hostile acts":

> Such [hostile] acts include, but are not limited to, sabotage, destruction of communications facilities, intentional misleading of troops by guides, liberation of prisoners of war, and other acts not falling within Articles 104 and 106 of the Uniform Code of Military Justice and Article **29** of the Hague Regulations.[34]

All the acts listed involve direct harm to an adversary rather than mere support of the civilian's own forces. That is consistent with the requirement of the Army Manual that the acts be committed about or behind the lines of the civilian's enemy.[35] Customary international law withdrew its protection from the civilian only when he deliberately and directly harmed his enemy.[36]

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[33] This was true even though the basic requirement to abstain from participation in hostilities is frequently mentioned in the writings of publicists and in the instructions of governments to their armed forces. Note the authorities gathered in note **22,** *supra.* Also:

> According to a generally recognized rule of International Law, hostile acts on the part of private individuals, not organized as compact movements operating under a responsible authority, are not acts of legitimate warfare, and the offenders may be punished in accordance with International Law.

II Oppenheim, *supra* note 11, sec. **57.**

[34] Para. 81. UCMJ, art. 104, punishes persons who aid or attempt to aid the enemy. UCMJ, art. 106 and the Hague Regulations, art. **29,** punish spying.

[35] Army Manual, FM 27–10, *sicpra* note **2,** para. 81.

[36] Precedent for a broader scope of unprotected activity can be found in some of the decisions of the Mixed Claims Commission following World War I. The issue was whether individuals submitting claims for damages suffered from German military action were members of the "civilian population" of the United States and

were "civilian" at the time of the injury or damage, as those terms were used in Article 232 and Annex I to Section I of Part VIII of the Treaty of Versailles.

In the leading *Damson Case (United States v. Germany)*, the claimant was master of an oil tanker requisitioned by the United States Shipping Board and operated by the War Department as a public ship. The ship was sunk by a German submarine while transporting oil from the United States to Europe for United States military forces. Damson claimed damages under the Treaty for personal injuries and loss of personal property.

Umpire Parker decided that Damson's civilian status under the laws of the United States was irrelevant, and applied a test of the "object and purpose" of his pursuits and activities at the time of the injury or damage of which he complained. He decided that, if Damson's activities "were at the time aimed at the direct furtherance of a military operation against Germany or her allies," then he could not be held to be a "civilian" or part of the "civilian population" within the meaning of the Treaty. Pointing to Damson's employment and control by the United States, and to the facts that he was subject to military discipline and that his mission was "directly in furtherance of a military operation against Germany or her allies", the umpire held Damson was not a "civilian" at the time of the damage and injury. VII Rep. of Int'l Arbitral Awards 184, 197–98 (1925).

Umpire Parker emphasized the "object and purpose" test with a further illuminating example. The taxicabs of Paris were requisitioned by the Military Governor of Paris and used to transport French reserves to meet and repel the oncoming German army. While so engaged, the taxicabs were regarded as military materiel. While driving them on such missions, their drivers also were not part of the "civilian population," since the "civilian population" is not generally exposed to such risks. It mattered not that the drivers had not been enrolled in the army, were not authorized to wear uniforms or bear arms, and did not possess a "military status." *Id.* at 198.

This principle was extended in the *Hungerford Case.* Men recruited by the YMCA for service with the American Expeditionary Forces in Europe lost their personal belongings when the British merchant ship on which they were sailing was sunk by a German submarine. Applying the *Damson* "object and purpose" test, Umpire Parker found that Hungerford and the other YMCA men were "engaged in activities aimed at the direct furtherance of military operations against Germany or her allies," and therefore coukld not be "civilians" under the Treaty. The YMCA entertainment was advertised as indispensable to the social welfare of the Army, and had the specific military function of maintaining and promoting morale. Moreover, the men were subject to court-martial for any offenses committed while accompanying or serving with the armies in the field. That they were not formally inducted into the Army and were not in the pay of the Cnited States Government was immaterial.

Thus, the concept of "civilian population" was limited by Parker to "passive victims of warfare, not to those who entered the war zone, subjected themselves to risks to which members of the civilian population generally were immune, and participated in military activities, whether as combatants or noncombatants." *The Hungerford Cnse (U.S. v. Germany)*, VII Rep. of Int'l Arbitral Awards 368, 370–71 (1926).

Certainly denial of civilian status for claims purposes is a far different matter than denial of such status for purposes of protection from the effects of hostilities.

Indicating Fourth Convention acceptance of this differentiation between direct harm to the enemy and support for one's own forces is the distinction drawn in article 15b between participation in hostilities and performing work of a military character. While neither activity is permitted those seeking shelter in the neutralized zones, the latter is banned only during residence in the zone. Analogous requirements are imposed on residents of hospital and safety zones provided for in article 14 of the Fourth Convention. They may not perform any work "directly connected with military operations or the production of war material" and "the lines of communication and means of transport which [hospital and safety zones] possess shall not be used for the transport of military personnel or material, even in transit."[37] The need to prohibit such activity within the zone implies its legality without. Such activity is prohibited within the zone not because it constitutes a "hostile act", but because its presence would render its location a legitimate military objective.

This distinction is also accepted by Pictet, who assumes "civilians taking part in the hostilities" are either "obeying an order for a levy in mass" or "belong to an organized resistance movement" under article 4A(2) of the Third Convention, while "work of a military character" is "any activity which helped current military operations, directly or indirectly . . . ."[38] Pictet's examples of participation in hostilities may be too narrow — the exclusion must include unprivileged combatants as well as those eligible for prisoner of war status if captured. The emphasis upon combatant acts, however, is consistent with the customary international law doctrine of hostile acts.[39]

Yet the "assumption of risk" language used by Umpire Parker in *Hungerford* raises serious questions of whether civilians accompanying the armed forces, e.g., accredited correspondents, technical representatives, Red Cross representatives, and others, waive the protections sought to be guaranteed them by their careful inclusion among the civilian population by article 50.1 of Protocol I.

[37] Draft Agreement Relating to Hospital and Safety Zones and Localities, arts. 2, 5(a) (Fourth Convention, *supra* note 1, Annex I).

[38] IV J. Pictet, *supra* note 26, 131–32.

[39] We may also quibble that Pictet's characterization of "work of a military character" is excessively broad. To forbid all activities which even indirectly help current military operations would frustrate the purpose of the zone. For example, establishing a temporary neutralized zone in which wounded combatants can seek shelter certainly helps military operations, at least indirectly, by easing the bur-

b. Protocol I

Protocol I, 'unless and for such time as they take a direct part in hostilities,'[40] protects civilians from the very dangers in military operations which the Fourth Convention so scrupulously ignored.[41] That the authorities and population refrain from hostile acts is also one of the requirements in non-defended localities and demilitarized zones.[42] Given this focus, "hostilities" and participation therein appear with much greater frequency in Protocol I and its negotiating history than in the Fourth Convention. Unfortunately, "hostilities" is not always used with the same meaning.[43] Several factors, however, indicate the drafters' intent to adopt the customary law's hostile acts doctrine with this language.

Consider the implicit meaning of "hostilities" as used in the title — General Protection Against Effects of Hostilities — for the section comprising articles 48 through 67 of the Protocol. The basic rule stated in articles 48 and 51.1 expresses an intent to protect the civilian population from military operations. The same phrase "military operations" is used in other articles as well,[44] except when the still more restrictive term "attack" is used.[45] The substance of articles 48 through 67 indicates that the "hostilities" from whose effects

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den imposed on the contending forces by article 12 of the First Convention, which requires the parties to the conflict to respect and care for the wounded and sick in all circumstances. Pictet's basic standard, however, whether the activity in question is compatible with the neutralized zone concept, is valid. IV J. Pictet, *supra* note 26, 132.

[40] Protocol I, *supra* note 1, art. 51.3.
[41] See text accompanying note 30, *supra*

[42] *Id.*, arts. 59 and 60, respectively. The non-defended locality, under article 59, may be declared unilaterally by a party to the conflict "near or in a zone where armed forces are in contact which is open for occupation by an adverse Party." A demilitarized zone, under article 60, is established pursuant to an agreement between the parties which may be concluded in peacetime or after the outbreak of hostilities. Its location may be in the zone of operations or elsewhere, and there is no requirement that it be open to occupation by an adverse party.

[43] For example, "hostilities" is used in article 60.2 in a very broad sense, apparently coterminous with "war" or "armed conflict." In article 53(a), "acts of hostility" means a deliberate act of destruction directed against a cultural object or place of worship.

[44] Arts. 51, 56, 57, 58, 59, 60.
[45] Art. 49.1 defines attacks as "acts of violence against the adversary, whether in offence or defence."

civilians are to be protected are military operations aimed against specific objectives. It follows that only through direct participation in military operations should a civilian forfeit his protection.

Second, the negotiating history supports a narrow interpretation for "hostilities" as it is used in article 51.3. In 1971 the ICRC suggested the phrase "military operations" in part since it feared "hostilities" had "too broad a meaning, covering a whole series of acts and circumstances in which civilians are directly involved."[46] The Conference of Experts chose "hostilities" for their 1972 draft, but they apparently rejected only the ICRC's fear that "hostilities" would be interpreted too broadly. The Experts' commentary on the 1972 draft listed the criteria for "hostilities" as "military or combatant activity."[47] Some acceptance of a similarly restrictive meaning of "hostilities" was evident during the second (1975) session of the Diplomatic Conference when several delegations expressed an understanding that "hostilities" included "preparations for and return from combat."[48] Such an expression for the record would be totally unnecessary unless a very narrow definition of "hostilities" was assumed.

Third, the express recognition of the right of combatants "to participate directly in hostilities" again ties "hostilities" to military operations. Since combatants are defined in that same paragraph as members of the armed forces of a party to the conflict, direct participation in hostilities must refer to those acts directly causing damage or injury to the enemy, which, under international law, only combatants are privileged to commit.

Fourth, in articles 59 and 60 the distinction found in article 15 of the Fourth Convention reappears. Two separate conditions, that no acts of hostility be committed,[50] and that there be no activities in

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[46] ICRC, *supra* note 32, at 27.

[47] II (Pt. 1) ICRC, Commentary at 84 (Jan. 1972) (submitted to the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 3 May–3 June 1972).

[48] Diplomatic Conference, Conference Doc. CDDH/III/224, Report to the Third Commission on the Work of the Working Group, at 4 (Feb. 24, 1975).

[49] Art. 43.2

[50] Arts. 59.2 (c), 60.3 (c).

support of military operations[51] or linked to the military effort,[52] are required to be satisfied by both nondefended localities and demilitarized zones.[53] The civilian population is never privileged to commit acts of hostility. Support given one's own military forces through manufacturing or transportation of supplies is not a hostile act,[54] yet such activities are legitimate military objectives and may be attacked by the enemy.[55] Therefore, the pursuit of these activities is inconsistent with the concept of a protected zone.

2. Individual or collective loss of rights.

a. Fourth Convention

The clear concern of common article **3** is the individual. Any person presently taking no active part in hostilities in a noninternational conflict is entitled to humane treatment in general and to the specific protections of that article. Individuals forfeit those protections while participating in hostilities. However, no group or collective forfeiture can be declared, because each individual regains the protection of common article **3** when his participation in hostilities terminates.

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[51] Art. 59.2 (d).

[52] Art. 60.3 (d). It should be noted that the 1971 ICRC proposal to substitute "military operations" for "hostilities" in art. 51.3 envisaged a tri-level phraseology: "Military operations" was the most specific. "Military effort" covered the "activities of civilians . . . who are objectively useful in defence or attack in the military sense, without being the direct cause of damage inflicted on the adversary, on the military level." Finally, "war effort" was that activity demanded by a State "of all persons placed under its sovereignty . . . ." ICRC, *supra* note 32, at 27–28.

[53] The initial ICRC draft of these articles was presented in 1973 for consideration by the Diplomatic Conference. That draft, and successive drafts through 1976, used the phrase "acts of warfare" rather than "acts of hostility." While the change in terminology perhaps was intended to broaden the proscription, it appears more likely to be an editorial change consistent with the language of article 15 of the Fourth Convention and the application of the 1949 Conventions and this Protocol to international armed conflicts without regard for whether there has been any formal declaration of war. See 1949 Geneva Conventions, *supra* note 1, common art. 2; Protocol I, art. 1.3

[54] Such activities are not hostile so long as they are not carried out behind enemy lines, or continued after one's territory is occupied.

[55] Military objectives are partially defined in art. 52.2

A different concern for neutralized zones is in evidence under article **15** and for hospital and safety zones under article **14.** The purpose of those articles is not to establish standards by which individuals are weighed and found eligible for shelter. Rather, article **15** and the Draft Agreement associated with article **14** strive to create a set of conditions under which the opposing armed forces will perceive no threat from the sheltered area. With such a sense of security, the fighting forces will be induced to permit the sheltered area to carry out its humanitarian tasks. In the absence of that sense of security, the most careful screening of admittees would not persuade fighting forces to respect the sheltered area.

Against that background it can be seen that a hostile act by an isolated individual within the sheltered area would not justify withdrawal of recognition of the area's special character. The question is whether activities within the area give or potentially may give one belligerent a significant advantage over another. Articles **14** and **15** are concerned not with isolated individual acts but group activities. Occurrence of prohibited activities will lead to forfeiture of protection for all, even the vast majority of persons located in the zone who are innocent civilians.

b. Protocol I.

While paragraph **3** of article **51** is phrased collectively, any interpretation that one civilian's participation in hostilities may cause legal forfeiture of another's protection is not supported by the negotiating history and would do substantial violence to the purpose of the protections in this and other articles. For example, article **50.3** provides that "the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character." Article **51.6** prohibits attacks against the civilian population or civilians by way of reprisals. The taking of hostages, whether to guard against hostile acts by civilians or for any other purpose, is banned by article **75.**

Like article **3** of the Fourth Convention, article **51.3** focuses on the individual to the maximum extent permitted by military necessity[56] in determining whether and for how long a particular civilian

[56] Note the high standard of care set by articles 57 and 58. These articles require precautions to be taken during the attack as well as during defence, to lessen the extent of incidental damage among civilians.

forfeits the protections afforded him under this Section of the Protocol.

Non-defended localities and demilitarized zones, like the hospital zones and neutralized zones under the Fourth Convention, do not involve questions of the proper status for a particular individual. Rather, the purpose of these concepts is to create that sense of security on the part of the fighting forces that will enable them to respect these localities and zones. For that reason the required conditions include prohibition of acts of hostility by the authorities or the population, not isolated acts of hostility by an occasional individual. While the latter cannot be condoned, and remedial action and future assurances may be demanded, only the former can present a legitimate basis for refusing to recognize, or to terminate recognition, of the protected area.

3. Consequences of unprotected activity

While the individual civilian is performing his unprotected activity, he is as fully exposed to the hazards of combat as the uniformed soldier. This is made abundantly clear in Protocol I, where all the protections against direct attack that the civilian normally enjoys are suspended for the duration of his unprotected activity. This result, however, is only declarative of the customary international law, as amy be inferred from common article **3** of the 1949 Conventions: the right to humane treatment is granted only to those who never, or are no longer, taking an active part in hostilities.[57]

The individual civilian also exposes himself to punishment by his captor for his hostile acts. Of course, once captured, his participation in hostilities ceases. He is entitled to a trial with some procedural safeguards to determine the fact of his unprotected activity and the appropriate punishment. How many procedural safeguards

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"While common article **3** refers to "armed conflict not of an international character" in stating its application, the principles it enunciates are distilled from customary international law and from principles set forth elsewhere in the 1949 Geneva Conventions. Common article 3 represented an innovative compromise attempt to apply that customary law and those principles to noninternational conflicts, in which previously civilians and other noncombatants were almost totally lacking any protections under international law. IV J. Pictet, *supra* note **26,** at 131-32.

he receives depends on whether he is protected under the Fourth Convention with its fairly extensive safeguards for those tried in occupied territory.[58] Even if our civilian is not protected by the Fourth Convention, he can now claim the benefit of similar rights under article 75 of Protocol I, assuming his conflict is international in nature.

In a noninternational conflict, article 3 of the 1949 Conventions at least prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'' If the Detaining Power does not recognize that the disturbance in which the civilian was caught attains to the level of a noninternational conflict, a civilian facing execution may argue that the ban on arbitrary deprivation of life contained in article 6 of the International Covenant on Civil and Political Rights[59] requires some form of judicial proceeding first to determine the fact of unprotected activity.

Consequences are far more extensive when the acts of hostility involve a hospital or neutralized zone under the Fourth Convention or a non-defended locality or demilitarized zone under Protocol I. Denial of protected status affects not only the civilians committing unprotected acts but all others who are sheltered in the protected area. Termination of the protected character of the area will not deprive its inhabitants of the general protections afforded all nonparticipating civilians, but it certainly does expose them to the very serious risks of damage suffered incidental to an attack upon a military objective.

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[58] Fourth Convention, *supra* note 1, arts. 64–76. It may be argued that a protected person tried in the national territory of his enemy is entitled to the same rights by virtue of the third paragraph of article 5, Fourth Convention. Pictet, however, assumes that the third paragraph does not extend occupied territory trial rights to those protected persons tried on national territory. The latter are assured only the "judicial guarantees recognized as indispensable by civilized peoples" and required by article 3. IV J. Pictet, *supra* note 26, at 58.

[59] VI Int'l Legal Materials 368 (1967). Entered into force Mar. 23, 1976. The United States is not a party. Article 6 is one of the specifically designated articles of the International Covenant from which no derogation is permitted even "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed . . . .'' Art. 4, paras. 1 & 2. The argument in the text assumes that the state in whose power our distressed civilian finds himself is a party to the International Covenant.

B. ACTS HARMFUL TO THE ENEMY

1. Scope of unprotected activity.

Protocol I represents a very substantial advance in the protection of civilian civil defence organizations, and their personnel, buildings and materiel, which are mentioned only briefly and indirectly in the Fourth Convention.[60] Under Protocol I, civilian civil defence organizations and their personnel may perform their civil defence tasks "except in case of imperative military necessity."[61] Further, "objects used for civil defence purposes may not be destroyed or diverted from their proper use except by the Party to which they belong."[62]

The original drafts discussed in the Conference of Government Experts contained no express provision for the cessation of protection. That first appeared in the 1973 ICRC draft.[63] The advantage of such an article is obvious. "Imperative military necessity'' may permit a belligerent temporarily to suspend the performance of civil defence tasks. However, the protection given the civil defence organization as an entity, its personnel, buildings, shelters, and material, continues until the commission "outside their proper tasks" of "acts harmful to the enemy." Protection extends not only to freedom from attack but also from requisition by the opposing belligerent during combat, and even subsequently during occupation, within certain limits.[64]

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[60] Fourth Convention, *supra* note 1, art. 63.

[61] Protocol I, *supra* note 1, art. 62.1.

[62] Art. 62.3.

[63] 1973 Draft, art. 58

[64] Arts. 62.3, 63.4–6. These provisions represent a substantial change from the existing law regulating actions with respect to other civilian property. During combat, enemy property can be seized or destroyed if that is "imperatively demanded by the necessities of war." Hague Convention No. IV, *supra* note 12, art. 23.g. An Occupying Power may requisition civilian labor under certain safeguards (Fourth Convention, art. 51). Foodstuffs and articles or medical supplies may be requisitioned for the use of the occupation forces and administration personnel after the requirements of the civilian population have been taken into account (Fourth Convention, art. 55). Even civilian hospitals may be requisitioned temporarily and in cases of urgent necessity for the care of military wounded and sick

The tasks involved in civilian civil defence are detailed in article 61(a). While earlier drafts of the civil defence chapter of Protocol I used shorter, nonexclusive lists, their non-exclusive language was deleted in the approved text. The drafters recognized that civilian civil defence organizations may be required by their authorities to perform other tasks beyond those listed. That is acceptable so long as those tasks are not harmful to the enemy.[65] While performing tasks not included in article 61(a), however, the international distinctive sign of civil defense may not be used to protect civil defense organizations, or their personnel, buildings, or materiel.[66]

Permitting cessation of protection only for the commission of "acts harmful to the enemy" and "outside their proper tasks" is a very deliberate limitation. Very early it was recognized that some civilian civil defence tasks could be closely associated with military operations while simultaneously serving a humanitarian function. For example, fire-fighting[67] which preserves a military objective set ablaze by enemy bombardment can be both harmful to the enemy, who has expended resources and perhaps lives in a futile attempt to take out that objective, and vital to the safety of the surrounding civilian population.[68] The relationship between the tasks listed in article 61(a) and the application of article 65 is necessarily very close.

"if suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation." Fourth Convention, *supra* note 1, art. 57.

[65] 1977 Draft Delegation Report, *supra* note 29, at 18.

[66] *Id*. Art. 66.1 limits use of the sign to times when civilian civil defense organizations, etc., are "exclusively devoted to the performance of civil defence tasks." The draft delegation report continues to say that the organization and its personnel do not enjoy the special protections of this Chapter of the Protocol while engaged in these other tasks though they do retain the regular protection from attack of all civilians under Protocol I. I differ on this last point. Though implementation of their special protection may be more difficult when they are not allowed to use the international protective sign, their protection under article 62 is not tied to the authorized civil defence tasks. The only purpose in listing the tasks, so far as article 62 is concerned, is to identify those activities whose performance shall not be hampered "except in case of imperative military necessity." For protection to cease under the terms of article 65, two conditions must be satisfied—the organization, personnel, etc., are committing acts outside their proper tasks, and additionally, those acts are harmful to the enemy.

[67] Art. 61(a)(vii).

[68] 1972 *Commentary, supra* note 47, at 138.

For protection to cease under article 65, two conditions must occur: tasks outside those listed in article 61(a) must be performed, and there must result consequences potentially helpful to that side's military operations or potentially harmful to the enemy's military operations. Paragraphs two, three, and four of article 65 list several different circumstances involving protected cooperation between civilian civil defence organizations and military authorities, as well as other indicia associated with the military but which may be employed by civilian civil defence organizations as well. The cited paragraphs specifically exclude these activities from consideration as harmful acts.

While no definition of harmful acts is provided, the great concern shown to ensure that many of the normal tasks of civilian civil defense are permitted to continue whether or not they harm the enemy, and the removal of language which could be used to justify for protection tasks beyond those included in the list, support the conclusion that the "harmful act" concept is a much broader concept than "hostile activity." Fighting a fire started by enemy bombers would never fit our earlier definition of hostile acts, while it definitely was considered a harmful act during the negotiation of these articles.

2. Individual or collective loss of rights.

Our present concern is multifacted. Protection is extended to civilian civil defence organizations, their personnel, and the organizations' buildings, shelters, and materiel. If the conditions stipulated in article 65.1 occur, any or all of these may lose protection, from the individual civil defence worker to the organization as a whole. Organizational loss of protection has the most far-reaching effects. All those who were beneficiaries of its protected activities will suffer as well. The seriousness of this result explains why article 65.1 requires first a warning. Cessation follows only if the warning goes unheeded.

3. Consequences of loss of protection

First, the performance of civil defence tasks will no longer be protected from interference in all cases except imperative military necessity; interference may now occur at will. Second, the interna-

tional protective sign may no longer be used. Protections shared by all civilians are retained, however, unless the acts committed were not only harmful to the enemy but also involved direct participation in hostilities. In that case even normal civilian protections are lost so long as the direct participation continues.[69] Withdrawal from participation in hostilities will result in restoration of civilian protections, but it will not necessarily lead to retrieval of civilian civil defence status.

IV. ACTIVITY PREJUDICIAL TO NATIONAL OR MILITARY SECURITY

When the ICRC draft text was presented to the 1949 Diplomatic Conference, several delegations stated that, in cases involving spies, saboteurs or other unprivileged combatants, there should be some derogations permitted from the rights normally accorded protected persons. Otherwise those rights could be used to the disadvantage of the detaining state.[70] To satisfy this concern, article 5 was adopted. It permits denial of certain rights to protected persons suspected of hostile activity in national or occupied territory when exercise of the rights denied would prejudice the security of the territorial state or occupying power. Unfortunately, the language of article 5 is too broad and does not restrict its use to these relatively limited situations.[71]

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[69] Art. 51.3.

[70] IV J. Pictet, *supra* note 26, at 52–53. Pictet does not find this argument entirely convincing. He believes the Draft Convention presented to the 1949 Diplomatic Conference had already taken into account legitimate security requirements. IV J. Pictet, *supra* note 26, at 53.

[71] Colonel G.I.A.D. Draper characterizes the wording of the article as "unfortunate." G. Draper, *The Red Cross Conventions* 29 (1958). Pictet, more expansively, states:

> The Article, as it stands, is involved — one might even say, open to question. It is an important and regrettable concession to State expediency. What is most to be feared is that widespread application of the Article may eventually lead to the existence of a category of civilian internees who do not receive the normal treatment laid down by the Convention but are detained under conditions which are almost impossible to check.

IV J. Pictet, *supra* note 26, at 58.

A. SCOPE OF UNPROTECTED ACTIVITY

As Pictet notes, "The very idea of activities prejudicial ["prejudicial" is drawn from the French text] or hostile to the security of the State, is very hard to define. That is one of the Article's weak points."[72] Our first concern is the source of applicable law determining what is prejudicial or hostile to security.[73] Without much discussion, Pictet assumes that the relevant definitions must be drawn from international law, at least for cases arising in occupied territory. Thus, he offers the definition of "spy" found in article 29 of the Hague Regulations[74] and searches without success through international law texts for a definition of sabotage. Article **29** of the Hague Regulations, however, only applies within a zone of operations of a belligerent, not in its national territory or in occupied territory after fighting has passed. Within its national territory, the belligerent state's municipal law of espionage will define the elements of that group of crimes.[75] Within occupied territory that subject will undoubtedly be included within the regulations issued by the occupying power to insure its security, maintain orderly government, and fulfil its obligations under the Fourth Convention.[76]

With respect to which rights, if exercised by a hostile-acting protected person within the territory of a Party, would be prejudicial

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[72] IV J. Pictet, *supra* note 26, at 56.

[73] While there is no requirement that the activity be labeled criminal before a state can derogate rights under article 5, certainly the activity which the state chooses to condemn will in most cases be the subject of criminal punishment under that state's laws. In discussing the situation in occupied territory. Professor Baster long ago pointed to state practice to support the advantages to both occupant antl inhabitant of regulations detailing those acts considered dangerous and which must be avoided. Baxter, *supra* note 23, at 251.

[74] "A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party." Hague Regulations, *supra* note 12, art. 29. Quoted at IV J. Pictet. *supra* note 26, at 57.

[75] For example, see 18 U.S.C. ch. 37 (1976), on espionage antl censorship. Also see 18 U.S.C. ch. 105 (1976), on sabotage. and 18 U.S.C. 2388 (1976), on activities affecting the armed forces during war. Also relevant are articles 104, aiding the enemy, and 106, spies, of the Uniform Code of Military Justice, at 10 U.S.C. 904 and 906 (1976).

[76] Art. 64. See also Baster, *supra* note 23.

to its security, Draper notes that the "State authorities are . . . the arbiter of their own security interests."[77] Pictet rightly points out that political attitude not translated into action does not satisfy the test of prejudicial activity.[78] But no further standards are set forth in article 5.

B. INDIVIDUAL, OR COLLECTIVE LOSS OF RIGHTS

Article 5 of Protocol I is concerned with protected persons as individuals. There can be no collective action under article 5.[79] Note, however, that deprivation of rights is not limited to cases in which the individual is proved to have engaged in activities hostile to state security. A "definite suspicion" [reasonable belief?] is sufficient to justify deprivation.

C. CONSEQUENCES OF UNPROTECTED ACTIVITY

Under the text of article 5, Protocol I, the consequences of hostile activities depend on their location. Within the territory of the state, the civilian loses all rights which, if exercised, would be prejudicial to its security. In occupied territory the civilian loses only his right of communication and then only when "absolute military security so requires."[80]

Determining which rights if exercised within the territory of the state would be prejudicial to that state's security may be something of a problem. Pictet finds these rights very limited in number[81] and lists them as the right to correspond,[82] to receive individual or col-

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[77] G.I.A.D. Draper, *supra* note 71, at 29.

[78] IV J. Pictet, *supra* note **26,** at 56.

[79] *Id.* at 58.

[80] The distinction may be more literary than real. Draper fears other rights as well will be denied those held in occupied territory. G.I.A.D. Draper, *supra* note 71, at **30.** And, of course, the State authorities are arbiters of their security interests here as well as in their national territory.

[81] IV J. Pictet, *supra* note 26, at 56.

[82] Art. 107.

lective relief,[83] to spiritual assistance from ministers of the civilian's faith,[84] and to receive visits from representatives of the Protecting Power and the International Committee of the Red Cross.[85] These are all rights involving communication. Draper is more pessimistic. Both for security and for administrative convenience, he fears states will deny all rights.[86] While recognizing that the third paragraph of article 5 assures the individual of the fair trial protections of the Fourth Convention, he points out that nothing precludes long-term incommunicado detention with trial delayed indefinitely.[87]

Contrary to the views of both Pictet and Draper, article 5 appears to the present writer neither to be limited to a short list of rights which may be denied to all persons affected under article 5, nor to permit denial of all Fourth Convention rights to such persons. Just as the decision must be made on a case by case basis whether the individual protected person is engaged in activity hostile to security, so also must the decision as to which rights, if exercised by *him*, would be prejudicial to security. The spy who may possess information valuable to the enemy presents a different problem than the saboteur who can fashion destructive devices from the most innocuous substances.

Draper highlights an additional problem. The language of article 5 suggests that action by security authorities is permissible to prevent a captured spy from passing his intelligence information to the enemy through exercise of his rights under the Fourth Convention. Yet the language does not exclude the opposite case in which the security authorities are trying to wrest from the protected person valuable information they believe he possesses.[88] While article 31 of

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[83] Art. 38

[84] *Id.*

[85] Art. 143

[86] G.I.A.D. Draper, *supra* note **71,** at **29–30.**

[87] *Id.* at **30.**

[88] Draper uses the World War II example in which "security custody" and promises of release therefrom of people or members of their family who sheltered escaping prisoners of war was used effectively to uncover escape organizations. *Id.* at 30 and n. **15.**

the Fourth Convention prohibits the use of physical and moral coercion against protected persons, "in particular to obtain information from them or from third parties," nothing in the text of article 31 would preclude denial of that protection to persons affected by article 5 if abstention from coercion would be prejudicial to state security; that is, nothing would hinder the security authorities from obtaining through coercion the information desired.

Fortunately, there are some limits to the discretion apparent in article 5. The third paragraph of article 5 requires these persons to be treated with humanity, a concept central to all the 1949 Conventions and used with frequency sufficient that it has definite substantive content. For example, the humanity standard would certainly include article 32's ban on specific acts — murder, torture, corporal punishment, mutilation, and medical or scientific experiments — as well as "any other measures of brutality whether applied by civilian or military agents."

Article 75 of Protocol I would also apply to persons affected by article 5 of the Fourth Convention.[89] Article 75 is an expanded version of common article 3 of the 1949 Conventions. It contains a requirement for humane treatment, prohibition against several acts considered inhumane under any circumstances, and other provisions to protect those "arrested, detained or interned for actions related to the armed conflict," whether or not they will subsequently be tried. For individuals who are brought to trial, the article also provides a nonexhaustive list of "recognized principles of regular judicial procedure" which must be respected.

Implicit in the foregoing discussion is the risk for the individual that he or she may face criminal punishment if his activity violates the municipal law of the enemy state or the regulations issued by the enemy occupying power.

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[89] Article 65 of the 1973 ICRC draft (which became art. 75 in the approved Protocol) specifically mentioned its application to "persons who are in situations under Article 5 of the Fourth Convention" as well as to nationals of states not bound by the Conventions and a Party's own nationals. In the last session of the Diplomatic Conference all examples of persons protected by this article were deleted in the compromise of a dispute over whether a Party's own nationals should be protected. 1977 Draft Delegation Report, *supra* note 29, at 28. There was no dispute over the application of article 75 to persons affected by article 5 of the Fourth Convention, and such persons are certainly within the scope of the application provisions in article 75.1.

V. DEPRIVATION OF RIGHTS FOR POTENTIAL HARM

Three articles of the Fourth Geneva Convention permit denial of rights even when the affected individual has not been involved in and is not suspected of hostile activity. Under article **35** of the Fourth Convention, all protected aliens are permitted to leave the territory of a party to the conflict "unless their departure is contrary to the national interests of the State." Article **42** permits internment of or imposition of assigned residence on an alien, "if the security of the Detaining Power makes it absolutely necessary." While hostile activity could obviously qualify an alien for such treatment, none of the three articles make such activity an explicit requirement before the limitations permitted may be imposed.

A. SCOPE OF PROTECTED STATE INTERESTS

The "national interest" protected in article **35** is a much broader concept than "security", which was used in earlier drafts but rejected by the Diplomatic Conference.[90] "National interest" is so broad, in fact, that virtually any action resulting from governmental policy, other than individual bureaucratic whimsy,[91] can be justified by its terms. Certainly no state will accept another's dictate as to what constitutes its national interest, especially in time of war.

That the national power of a state depends on much more than the mere size of its standing armed forces has long been recognized. The factors affecting national power have been described in terms of control over people; i.e., the more skilled, loyal, and large in number its population, the better; control over economic and geographic resources; and control over institutional arrangements, including both internal and external structures and processes for decision-making.[92] In time of war anything that enhances the national power of one belligerent or detracts from its enemy's power

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[90] IV J. Pictet, *sicpra* note **26,** at **236**

[91] Note the requirement in the second sentence of article **35** that applications to leave be decided in accordance with regularly established procedures.

[92] McDougal & Feliciano, *supra* note **3,** at **307-08.**

may be a "national interest." In human terms this may mean withholding permission to leave the national territory from those whose departure could hurt the territorial state or whose arrival abroad could help the enemy. For example, a skilled scientist who could do vital weapon research for the enemy may be retained. Men of military age who may be drafted or may enlist if allowed to return to their home country could be denied exit. Skilled workers, whose absence would place severe stress on the economy, may be required to stay.[93]

Articles 42 and 78 return to the term "security," itself a sufficiently broad criterion, as justification for the restrictions upon liberty they permit. "Security" remains as vague here as in earlier articles, but, as Pictet points out, the expression does not seem susceptible of more concrete definition. Pictet now concurs with Draper's earlier "arbiter" sentiment, saying that determination of the "measure of activity prejudicial to the internal or external security of the State which justifies internment or assigned residence is left largely to the Government."[94]

It must be emphasized that the danger which is perceived by the state and which permits such restrictions is not limited to hostile activity, though that is certainly included. On the other hand, mere enemy nationality cannot suffice as evidence of a threat since these measures are to be exceptional rather than ordinary. Even Pictet, however, suggests that knowledge or qualifications may represent a real threat to the state's present or future security. That a man is of military age alone may not justify these restrictions, but the fact that he is able to join the enemy armed forces does.[95]

B. INDIVIDUAL OR COLLECTIVE LOSS OF RIGHTS

Internment and assigned residence, whether in the occupying power's national territory or in occupied territory, are "exceptional" measures to be taken only after careful consideration of each individual case. Such measures are never to be taken on a collective

[93] G.I.A.D. Draper, *supra* note 71, at 36; IV J. Pictet, *supra* note 26, at 236.

[94] IV J. Pictet, *supra* note 26, at 257.

[95] *Id.* at 258 and n.1.

basis. The strict limitations of these articles are a direct reaction to the abuses which occurred during World Wars I and II and which diametrically changed the previous custom that "nationals of a belligerent residing within the territory of the adverse party were not to be interned."[96]

Decisions under article 35 whether to deny applications to leave the territory will involve broad categories of individuals, such as draftable men, thus involving group loss of rights. Denial is also permitted in specific cases of potential harm, such as the nuclear physicist beyond draft age. Decisions are to be promulgated, however, on a case-by-case basis when the enemy alien applies for an exit permit.[97]

VI. CONCLUSION

Protection of civilians is a fundamental policy of the law of war. Nevertheless, there are many instances in which a civilian may lose that protection, either through forfeiture because of his own activity, or through happenstance involving no fault on his part. This article has examined some instances of each arising under the Fourth Geneva Convention and Protocol I.

Our examination has been selective rather than comprehensive. The provisions we have examined evidence a balance between protection for legitimate state concerns and protection for the civilian. There is a broad correlation between the act or threat of the civilian and the protections or rights he loses. The description of activity or conditions which will deprive a civilian of protections is sufficiently comprehensive that the individual state is not legally disarmed in the face of any actual threat. In several instances decisions must be

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[96] *Id.* at 232, 258. In the nineteenth century treatment of resident enemy civilians in the event of war was a frequent subject for bilateral agreements. Wilson. *Treatment of Civilian Alien Enemies*, 37 Am. J. Int'l L. 30, 32–33 (1943).

[97] The language of article 35 can be misleading. It envisages no action until the individual resident alien decides he wishes to leave and applies for permission. As Draper points out, nothing prevents a state from expelling all resident enemy aliens when the conflict begins. Moreover, those being expelled lack any counterpart to article 35 to assure them permission to carry necessary funds for the journey and a reasonable amount of their personal effects. G.I.A.D. Draper. *supra* note 71, at 36.

made in each individual case; collective disposition is not permitted. Such requirements do not render the state impotent but merely reduce the risk of arbitrary action adversely affecting the individual.

The instances examined illustrate the spirit referred to by the International Committee of the Red Cross in **1973** when it presented its draft Protocols to the first session of the Diplomatic Conference:

> In drawing up the draft Protocols . . . the ICRC believes that it has remained steadfast to the spirit in which, since 1864, it has demanded for the benefit of individuals guarantees consistent with the dictates of humanity, whilst bearing in mind the realities of national defence and security.[98]

[98] ICRC, *Introduction to Draft Additional Protocols to the Geneva Conventions of August 12, 1949*, at 2 (1973).

HUMANITARIAN PROTECTION FOR THE VICTIMS OF WAR: THE SYSTEM OF PROTECTING POWERS AND THE ROLE OF THE ICRC*

by Captain George A.B. Peirce**

Nations at war with each other often need the assistance of a neutral third party to exchange communications and conduct business. Common Articles 8 and 10 of the four Geneva Conventions of 1949 give formal recognition to this need by establishing the protecting power system for humanitarian purposes. As an alternative, belligerent states can agree to allow the International Committee of the Red Cross to perform the duties of the protecting power.

Captain Peirce explains the origins of the protecting power concept, with a review of traditional practice and the development of the Geneva Conventions from 1864 onward. He describes how the protecting power system has worked in the past, and what are its prospects for the future. He demonstrates also how, decade by decade, the Red Cross has gained increasing acceptance as an assistant to protecting powers in modern times.

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* The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

This article was originally written for a seminar on international law problems under the supervision of Professor R.R. Baxter at Harvard Law School during the second semester of academic year 1978–79. Professor Baxter, now a judge on the International Court of Justice, or World Court, the Hague, Netherlands, delivered the Ham Young Lecture at TJAGSA in 1977. His lecture was published at 79 Mil. L. Rev. 157 (winter 1978).

** Judge Advocate General's Corps, United States Army. Trial Counsel, Office of the Staff Judge Advocate, Headquarters, 1st Infantry Division (Mech), Fort Riley, Kansas, Oct. 1979 to present. Completed 90th Judge Advocate Officer Basic Course, TJAGSA, Charlottesville, Va., Oct. 1979 (distinguished graduate). B.S., United States Military Academy, 1974; J.D., Harvard Law School, 1979 (cum laude). Member of the District of Columbia Bar. Author of recent developments note, *Arms Control: SALT*, 19 Harv. Int'l L.J. 372 (1978).

In conclusion, Captain Peirce expresses doubt that the protectiiig power system, despite its conceptual attractiveness, will ever be much used. Many wars have beetr fought since the system has beeir formalized in the 1949 Conventions, but the parties to these wars have scarcely used the system, appareutly fearirig unwanted interference by a conscientious protectiiig power. Cnptaitr Peirce concludes further.that the method of ensuring compliance with the humanitarian law of war most likely to succeed is after all simply careful training of military personnel in their dirties aiid responsibilities under that law.

I. INTRODUCTION

> If one stops to consider what the law of war seeks to achieve one is both appalled at the scale of the undertaking and uplifted by the sheer resilience and hopefulness of the human spirit in attempting such a task . . . To endeavor to subject to normative restraints the conduct of warfare is perhaps the summit of human ambition in the law-making and law-applying area.[1]

This is an examination of one aspect of the challenge of law-application described above. It concerns the role of third-party supervision in the implementation of humanitarian law in armed conflicts. The law of war, which is the oldest part of the modern international legal order, developed from the medieval law of arms, which generated its own methods for encouraging compliance, such as ransom and spoils, reprisals, proceedings before military tribunals, and the code of chivalry.[2] Today, however, the primary mechanism relied on by states to insure the implementation of the humanitarian law governing the treatment of war victims embodied in the four Geneva Conventions of 1949[3] is the system of protecting

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[1] G. Draper, Implementation of the Modern Law of Armed Conflicts 6 (1973).
[2] Draper, *supra* note 1, at 5. See M. Keen, The Laws of War in the Late Middle Ages (1965).

[3] Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, [1955] 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter cited as Convention I]; Convention for the

powers and substitutes therefor recognized and elaborated in common Articles 8 and 10 of the Conventions.[4]

Unhappily, this system, upon which the effectiveness of the Conventions primarily depends, has rarely been implemented in the numerous international conflicts which have occurred since 1949. Furthermore, this system, by the terms of the Conventions, does not apply to the non-international conflicts which have been so frequent in the past three decades.[5] In the absence of protecting power supervision, respect for the humanitarian provisions of the Conventions has been encouraged chiefly through the unofficial good offices and humanitarian relief efforts of the International Committee of the Red Cross (ICRC). This is an organization of Swiss citizens dedicated to the alleviation of the sufferings of victims of war, and has played the central role in the development of humanitarian law.

The changing nature of modern warfare, coupled with the contemporary failure of belligerents to make use of the system of protecting powers, provided the impetus for recent efforts to modernize the law of war and, in particular, to strengthen the mechanisms for its implementation. These efforts culminated in the adoption of two new Protocols Additional to the Geneva Conventions of 1949[6]

Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. **12, 1949,** [1955] **6** U.S.T. **3217,** T.I.A.S. No. **3362, 75** U.N.T.S. **85** [hereinafter cited as Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. **12, 1949,** [1955] 6 U.S.T. **3316,** T.I.A.S. No. **3364, 75** U.N.T.S. **135** [hereinafter cited as Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. **12, 1949,** [1955] 6 U.S.T. **3516,** T.I.A.S. No. **3365, 75** U.N.T.S. **287** [hereinafter cited as Convention IV].

[4] Articles **9** and 11 of Convention IV.

[5] Except for common Article **3,** which sets forth general humanitarian principles applicable in internal conflicts of sufficient intensity, the Conventions, including common Articles 8 and 10, apply only to international conflicts between two or more High Contracting Parties. Common Article **2,** Conventions I–IV.

[6] Protocol Additional to the Geneva Conventions of **12** August **1949,** and Relating to the Protection of Victims of International Armed Conflicts [hereinafter cited as Protocol I]; Protocol Additional to the Geneva Conventions of **12** August **1949,** and Relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter cited as Protocol II].

The Conference adopted the Protocols by consensus on June **8, 1977.** They were opened to signature on December **12, 1977,** at Berne, for a period of **12** months. The texts of the Protocols may be found in UN Doc. **A1321144** (1977), Annexes I and 11, 16 Int'l Legal Materials **1391, 1442** (1977).

by the recent Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which met in Geneva from 1974 to 1977. One of the principal objectives of the Conference was to strengthen the system of protecting powers and substitutes, and its work reaffirmed reliance on this system as the primary means to insure the implementation of humanitarian law in future international conflicts.[7]

One of the principal questions addressed herein is whether this degree of reliance on the system of protecting powers and substitutes will be justified in future conflicts. Before reaching that question, however, we shall examine the historical development of the protecting power as an institution of international custom, its legal recognition and elaboration in the Geneva Conventions, the concurrent development of the humanitarian role of the ICRC, and the recent efforts of the Diplomatic Conference to strengthen the system. Our final inquiry will concern possible future developments in the law which might enhance the prospects for effective third-party supervision of the implementation of humanitarian law in armed conflicts.

II. THE EVOLUTION OF THIRD-PARTY SUPERVISION TO 1945

The institution of the protecting power — a neutral state representing the interests of a second state in the territory of a third — has its origins in international custom, not as an enforcement mechanism developing within the law of war, but rather as the outgrowth of informal peacetime diplomatic efforts aimed at the protection of individual foreigners in territories where their own sovereigns were not diplomatically represented. A review of the historical development of this international institution up through the period of its widest application during World War II will illus-

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[7] It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers. . . .

Article 5, Protocol I

trate the origins and gradual expansion of the role of third states in the protection of foreign interests. We shall also review the concurrent development of the humanitarian role of the ICRC.

The evolution of the protecting power system began with the unofficial protection of foreign interests provided by an individual diplomat in peacetime acting at his discretion or at the request of his own sovereign.[8] This included the ancient practice of using foreigners as representatives abroad, exemplified by the proxenos of ancient Greece, "a notable citizen who voluntarily served as a sort of honorary consular officer to protect within his own nation the interests of a foreign state."[9] Sovereigns also extended protection to foreigners in a third state where the latter were unrepresented on the basis of extraterritoriality, which relied on a concept of sovereignty as personal rather than territorial (L'Etat, c'est moi). As early as the 13th Century, the Venetian Resident at Constantinople extended protection at the instance of his government to Armenians and Jews, as well as Venetians within the city.[10] During the 16th Century, France achieved a pre-eminent position as the protector of Christians of various nationalities in Constantinople during the regime of the Capitulations, largely because France had extended protection at a time when other European nations had yet to conclude treaties of friendship with the Ottoman Empire.

The characteristics of the French practice were typical of the diplomatic efforts made on behalf of foreign interests by European states, and later by the United States, through the first half of the 19th Century. General protection was afforded to Westerners without regard to nationality, based on a recognition of common religion, humanitarianism, and the consent of the local sovereign." The diplomatic representative extending protection retained an unofficial status: he was not an official representative of the foreign state whose subjects were being protected. Rather, he exercised "per-

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[8] Information regarding customary diplomatic protection of foreign interests is drawn primarily from W. Franklin, Protection of Foreign Interests (1946), which provides a detailed account of diplomatic practice in this area, primarily from the perspective of the United States.

[9] Franklin, *supra* note 8, at 15.
[10] *Id.* at 8.
[11] *Id.* at 9. ***See*** *also* 4 J. Moore, Digest of International Law 585 (1906) (letter of U.S. Secretary of State John Foster, 1892).

sonal good offices"[12] on behalf of foreigners with the local government. Until the mid-19th Century, not only did the initiative remain with the protector, but the exercise of good offices was largely within the discretion of the individual diplomat and not the subject of instructions from his government.[13]

During the latter half of the 19th Century, it became common in wartime for belligerents to expel each other's diplomats and to impose stringent controls on enemy aliens. The result was that a belligerent state no longer benefited from the presence of its diplomats in the territory of its adversary at the very time when its citizens in the adversary's territory were most likely to need diplomatic assistance. In response to this situation, states began to request neutral nations to intervene diplomatically in the territory of the adversary to provide such diplomatic assistance in wartime. The initiative in securing protection passed from the protector to the protected state, and the exercise of unofficial good offices by the former became a matter for state-to-state negotiations, even though retaining an unofficial character.[14]

The first notable example of such neutral protection of belligerent interests occurred during the Franco-Prussian War of 1870–71, when the United States, at the request of Germany, extended protection to German interests in France through the exercise of good offices by the United States Ambassador in Paris, E.B. Washburne. As Mr. Washburne later acknowledged, he was not aware of any particular rules that had ever been laid down for such a situation, and he felt "obliged to grope in the dark," fearing that if he avoided Scylla he "might be wrecked on Charybdis."[15] Nevertheless, his

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[12] The term "personal good offices" has come to acquire a variety of connotations in diplomatic practice, but in its "basic and original form" (as used herein) it refers "to the time-honored prerogative of a diplomat or consul to intervene unofficially with local authorities in order to obtain a favor for one of his nationals in a private matter." Franklin, *supra* at **22,** citing 1C. de Martens, Le Guide diplomatique 179 (1954).

[13] Franklin, *supra* note 8, at **22.**

[14] In 1867, several European states requested the good offices of the American consul at Mexico City on behalf of their interests in Mexico. This marked a change in perspective. since formerly the exercise of personal good offices was related to matters not deemed sufficiently important for state-to-state negotiations. *Id.* at **27, 29.**

[15] *Id.* at 39–40, citing 1E. Washburne, Recollections of a Minister to France 43–44 (1887).

efforts proved effective and exerted considerable influence on the course of future developments. They also marked the beginning of formal designation of a protecting power in wartime at the request of a belligerent.

Following the outbreak of the Boer War in October 1899, the American Consul at Pretoria, W. Stanley Hollis, accepted charge of British interests there at Britain's request, and with the Department of State's approval. The Transvaal government consented to Hollis' exercise of good offices on behalf of British subjects, with the understanding that Boer prisoners of war would be similarly treated by the British. Hollis forwarded letters and packages to British prisoners and diligently endeavored to furnish each "with a pipe and a handful of tobacco."[16] But beyond this, neither Hollis nor his successor Adelbert Hay actually visited any POW camps nor were they able to furnish much relief to British civilians. The Boer War experience is nonetheless significant as an example of limited protection of belligerent interests by a third party in an essentially internal conflict. This episode contrasts with the frequent absence of third-party assistance in internal war which we shall later examine.

Assistance to prisoners of war and civilians was provided on an unprecedented scale by United States and France, acting as protecting powers for Japan and Russia, respectively, during the Russo-Japanese War of 1904–06. Lists of prisoners were exchanged between the belligerents through their French and American intermediaries, and representatives of the protecting powers made visits to prisoner-of-war camps in Russia and Japan. American officials successfully secured the repatriation of a large number of Japanese civilians from Siberia during hostilities, and also the repatriation of 2000 Japanese prisoners of war from Russia at the war's end.[17]

Prior to the Russo-Japanese War, protecting powers had been primarily concerned with the protection of embassy premises and the representation of the political and economic interests of the protected state. The extensive efforts of the United States and France on behalf of prisoners of war and civilians represented a substantially increased emphasis on the humanitarian role of the protecting

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[16] Franklin, *supra* note 8, at 71.
[17] *Id.* at 78–79, citing S. Takahashi, International Law Applied to the Russo-Japanese War 115–118 (1908).

power in time of war. Therefore, despite the fact that the Hague Conventions of 1899 and 1907[18] provided no role for the protecting power concerning the conduct of hostilities, the Russo-Japanese experience furnished an historical precedent for exercise of authority by the protecting power to contribute to the implementation of humanitarian measures on behalf of war victims.[19]

At this stage in the development of the humanitarian role of the protecting power, it is appropriate to recognize the concurrent development of the role of the ICRC in providing relief to victims of war.

During the French and Sardinian campaign against Austria in 1859, approximately 38,000 officers and men were killed or wounded within fifteen hours at the Battle of Solferino.[20] Many of the wounded died due to lack of medical care. Henry Dunant, a resident of Geneva, witnessed the battle and was moved to publish a book called "Un Souvenir de Solferino," which proposed that nations should, in peacetime, establish relief societies to aid army medical services in time of war, and further that the nations should enter

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[18] Convention With Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803. T.S. No. 403, 2 Malloy 2042 [hereinafter cited as Hague Convention II]; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2279, T.S. No. 539, 1 Bevans 631 [hereinafter cited as Hague Convention IV]; Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540, 1 Bevans 654.

[19] The law of war, in the broad sense, is often divided into two components, referred to as "the law of The Hague" and "the law of Geneva." The former, embodied in the Hague Conventions of 1899 and 1907, is concerned with regulating the actual conduct of hostilities between combatants. The law of the Geneva Conventions, in contrast, focuses on protection of military personnel placed *hors de combat,* and of civilians, and is therefore commonly referred to as "humanitarian law." *See, e.g.,* J. Pictet, Humanitarian Law and the Protection of War Victims 16–17 (1975).

Thus, when one aks of the protecting power's humanitarian role, the reference is to implementation of the law of Geneva. The role of the protecting power has not, as yet, been extended to include supervision of the actual conduct of hostilities.

[20] Solferino is located in the province of Lombardy, in northern Italy. In the battle which took place there on 24 June 1859, France under Napoleon III and Sardinia under Victor Emmanuel II defeated Francis Joseph I of Austria. As a result of this defeat, Austria was forced to give up Lombardy, and the new Kingdom of Italy came into being in 1861.

into a convention acknowledging the status and function of these relief societies.

In 1863 the Geneva Societe d'Utilité Publique set up a committee of five men to study these proposals. The Societe became the International Standing Committee for Aid to Wounded Soldiers. It retained this title until 1880 when it became the International Committee of the Red Cross.

In 1863 a conference of 16 European states convened at Geneva, reconvened in 1864 with 12 states, and drafted the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.[21] This document laid down general principles adhered to in later Geneva Conventions: relief to the wounded without regard to nationality; neutrality and inviolability of medical personnel, establishments, and units; and use of the distinctive symbol of the red cross on a white field.[22] The 1864 Convention was ratified by the European Powers by 1867, and by the United States in 1882.

The 1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field [23] was the result of an effort to revise and improve upon the 1864 convention. Personnel of aid societies were assimilated into the protected corps of medical personnel. Personnel of an aid society of a neutral state could lend their services with the prior consent of their own government and that of the belligerent they sought to assist. That nation was required to notify the enemy before their use.[24]

Thus, on the eve of the First World War, while formal legal recognition had been given to the role of relief societies, including those of neutral states, the protecting power, mentioned in neither the Hague nor Geneva Conventions, remained a creature of international custom, with a not too clearly-defined role in the humanitarian protection of war victims. As a result, upon the outbreak of

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[21] Dated Aug. 22, 1864, 22 Stat. 940, T.S. No. 377, 1 Bevans 7. This convention remained in effect until 1966, when the Republic of Korea, the last party to it which had not acceded to a later convention, acceded to the 1949 Conventions.

[22] *Id.*, Articles 6, 1, 2, and 7. This symbol is a reversal of the Swiss national symbol, which is a white cross on a red field.

[23] Dated July 6, 1906, 35 Stat. 1885, T.S. No. 464, 1 Bevans 516.
[24] *Id.*, Articles 10 and 11.

World War I, there was confusion over the extent of the protecting power's responsibility and authority in regard to prisoners of war and civilian internees.[25] The Russo-Japanese War provided an historical precedent for the argument that the protecting power was properly concerned with the plight of these individuals, but there had been no clear legal recognition of such activities.[26] The United States, which shouldered the major burden of protecting power duties during the period of its own neutrality, initially declined to become actively involved in matters concerning prisoners of war and civilian detainees, for fear of jeopardizing that neutrality.[27] It later became apparent that the prisoner-of-war problem could not be ignored, and American diplomats began inspection visits to the various camps.

Related to the uncertainty regarding the proper role of the protecting power toward prisoners and detainees was the question of its diplomatic posture in general. Recall that, at least by the late 19th Centrury, the initiative in securing protection had passed from the protecting state to the protected state. Accordingly, the protecting power normally served as a channel of communication between adversaries and remained neutral. It provided a voice for the protected state, but not an advocate. However, with the extension of the protecting power's role into areas of humanitarian concern, the idea of remaining a "passive voice" became more difficult to reconcile with effective action.

Indeed, United States diplomats were criticized by their "client" states in World War I for a lack of "enthusiastic partisanship" in pursuit of the goals of the protected states.[28] In fact, their evenhanded approach was in full conformity with instructions from Secretary of State William Jennings Bryan, who advised his officers

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[25] *See* Franklin, *supra* note 8, at 95.

[26] Neither the Geneva Conventions of 1864 and 1906 nor the Hague Conventions of 1899 and 1907 made any reference to the activities of protecting powers.

[27] The United States initially instructed the American Charge d'Affaires in St. Petersburg to cease his protests regarding the condition of Austrian and German prisoners of war. 1914 U.S. Dept. of State, Foreign Relations of the United States, Supplement, at 750–51 (1928) [hereinafter cited as Foreign Relations, Supplement].

[28] 1916 Foreign Relations, Supplement, *id.*, at 816–18 (1929) (letter of U.S. Ambassador to Austria-Hungary to the Secretary of State).

that they were "not officers of the unrepresented government" and were to use only unofficial good offices. "Your position . . . is that of the representatives of a neutral power whose attitude toward the parties to the conflict is one of impartial amity."[29] Thus, there had begun to develop a tension between the protecting power's position of neutrality and its expanding responsibilities in the area of humanitarian protection, which often required a "partisanship on behalf of humanity" which was subject to misconstruction as a lack of political neutrality.[30]

Despite these difficulties, the protecting powers of World War I succeeded in ameliorating conditions for an unprecedented number of prisoners of war. Several protecting powers were able to visit camps and to facilitate special agreements between belligerents governing the treatment of prisoners.[31] The war also established the precedent of succession by a new neutral state when a protecting power became a belligerent.[32] The protecting powers were greatly aided by the work of the ICRC, which established a Central Information Agency on prisoners of war, which eventually contained seven million index cards. The ICRC also sent numerous relief missions to prisoner-of-war camps.[33]

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[29] Instructions to Diplomatic and Consular Officers of the United States of America Entrusted with the Interests of Foreign Governments at War with the Governments to Which Such Officers are Accredited, Department of State, Aug. 17, 1914, *reprinted in* 9 Am. J. Int'l L. Suppl. 118–120 (1915).

[30] The daily requests of an American diplomat on behalf of various states gradually created hostility toward him in the host nation. "The United States came to be regarded as 'three-fourths enemy.'" Franklin, *supra* note 8, at 102.

[31] A German proposal which gained wide acceptance was that during camp visits the prisoners should be allowed to talk to inspectors in the presence but beyond the hearing of camp officials. 1915 Foreign Relations, Supplement, *srcpra* note 26, at 1011 (1928). This proposal was later embodied in Article 86 of the 1929 Prisoners of War Convention, cited at note **37,** *infra*.

[32] The United States Ambassador to Germany, Mr. Gerard, entrusted British interests to the Netherlands, and Japanese, Serbian, and Romanian interests to Spain upon his recall in 1917. 1917 Foreign Relations, Supplement 1, *supra* note 26, at 586 (1931).

[33] 3 Int'l Comm. of the Red Cross, Commentary on the Geneva Conventions of 12 August 1949, at 94 (1960) [hereinafter cited as Commentary].

The four-volume Commentary was prepared under the general editorship of Dr. Jean S. Pictet, director for general affairs of the International Committee of the

As a result of World War I, the institution of the protecting power as a guardian of belligerent interests had become well-defined by state practice.[34] The protecting power had to be a state; it had to be neutral; and it had to have diplomatic relations with both the protected state, or power of origin, and its adversary, the detaining power.[35] The protecting power acted as an intermediary at the request of the power of origin and with the consent of the detaining power. It acted independently and voluntarily through the unofficial good offices of its diplomats, and could refuse to act if such action would jeopardize its own interests or infringe the lawful rights of a belligerent.[36] The protecting power's functions included maintenance of communication between the belligerents, possession and protection of diplomatic premises, and protection and repatriation of nationals of the power of origin present in the territory of the detaining power.[37]

It was at this stage of its development that the role of the protecting power was given formal legal recognition by the 1929 Geneva Convention Relative to the Treatment of Prisoners of War.[38] The purpose of this convention was to supplement the Hague provisions of 1899 and 1907 pertaining to the treatment of prisoners

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Red Cross, Geneva, Switzerland. Volume I, concerning the First Convention, was published in 1952; volumes II and 111, concerning the Second and Third Conventions, in 1960; and volume IV, in 1958.

[34] Franklin calls the period 1867–1899 the "formative period" of rapid growth of the practice of protection of foreign interests, with later developments (to include the First World War) as "representing for the most part an expansion and variation of a theme already well marked by the beginning of the twentieth century." Franklin, *srcpra* note 8, at 30. World War I clarified the principal questions concerning the role of the protecting power with respect to prisoners and internees.

[35] Continued diplomatic relations with both belligerents were essential to enable the protecting power to carry out its function as a channel of communication. Resort to the protecting power was predicated on the absence of diplomatic relations between the power of origin and the detaining power. This condition was applicable in peacetime as well as war. *Id.* at 116. *See also* E. Castren, The Present Law of War and Neutrality, at 91 (1954).

[36] Castrén, *supra* note 35, at 92. Generally, the presence of a protecting power did not alter the primary responsibility of the detaining power for aliens within its jurisdiction. Franklin, *supra* note 8. at 143–44.

[37] Castrén, *supra* note 35, at 93.

[38] Dated July 27, 1929, 47 Stat. 2021, T.S. No. 846, 118 L.N.T.S. 343. As of January 1, 1978, Burma was the last party to the 1929 Convention which had not yet acceded to 1949 Convention III.

of war.[39] The ICRC, which had begun drafting the 1929 convention after World War I, proposed that it be entrusted with supervising the implementation of the convention, primarily because the ICRC recognized that a state protecting power, as the representative of one belligerent, might not be regarded as impartial by the others.[40]

The Diplomatic Conference of 1929 did not adopt the ICRC's proposal. Instead, the delegates chose to rely on the institution of the protecting power to facilitate the application of the convention. Article 86 provided, in part:

> The High Contracting Parties recognize that a guarantee of the regular application of the present Convention will be found in the *possibility of collaboration* between the Protecting Powers charged with the protection of the interests of the belligerents . . . .
>
> The representatives of the Protecting Power or their recognized delegates *shall be authorized* to proceed to any place, without exception, where prisoners of war are interned . . . .
>
> Belligerents *shall facilitate* as much as possible the task of the representatives or recognized delegates of the Protecting Power.[41]

The second and third paragraphs above are representative of all other references to the protecting power in the convention,[42] save

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[39] Hague Convention 11, Annex Chapter II, Articles 4–20; Hague Convention IV, Annex Chapter II, Articles 4–20.

[40] The text of the ICRC proposal was as follows:

> The Contracting Governments, in case of war, shall mandate to the ICRC the mission of appointing roving Commissions, composed of citizens of neutral States, whose duty it shall be to ensure that the belligerents make regular application of the provisions of the Present Convention.

F. Siordet, The Geneva Conventions of 1949: The Question of Scrutiny, quoted at 12 (1953).

[41] Art. 86, *supra* note 38. Emphasis added

[42] In addition to the articles mentioned in text, the protecting power is referred to in Articles 31, 39, 42, 43, 44, 60, 62, 65, 66, and 77. These articles recognize the right of its representatives to receive prisoner complaints directly or through prisoner representatives; to send relief items to camps; to correspond by mail with prisoners; to procure legal counsel for prisoners and be notified of judicial pro-

creating rights for the protecting power and for prisoners, but not one. That is, the obligatory language is directed at the belligerents, requiring the protecting power to carry out particular tasks. The exceptioin is Article 87, which directs that "[i]n the event of dispute between the belligerents regarding the application of the provisions of the present convention, the protecting powers *shall*, as far as possible, lend their good offices with the object of settling the dispute." [43]

This allocation of rights and duties is reflective of the fact that the delegates to the Diplomatic Conference wanted to recognize the contribution that third-party supervision could make to the implementation of humanitarian law, but did not presume to define the term "protecting power" or to list its functions exhaustively. The institution retainecl its independent existence in international usage, and it was generally agreed that the protecting power could decline to take any action which it found to be inconsistent with its own national interest. Article 87 is therefore very significant in the evolution of the protecting power's humanitarian role, because it represents the first attempt to create an obligation for any protecting power which is a high contracting party.

The 1929 Prisoner-of-War Convention is also a landmark in the development of the legal basis for the humanitarian work of the ICRC. Article 88 constitutes the first explicit recognition of this organization's role by providing that "[t]he foregoing provisions [concerning execution of the Convention] do not constitute any obstacle to the humanitarian work which the International Red Cross Committee may perform for the protection of prisoners of war with the consent of the belligerents concerned.'' Similarly, Article 79 recognizes the role the ICRC might play in the establishment of a central agency of information concerning prisoners and adds that "[t]hese provisions shall not be interpreted as restricting the humanitarian work of the International Red Cross Committee."[44]

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ceedings and sentencing; and to act as intermediaries in the establishment of information bureaux.

[43] Art. 87, *supra* note 38. Emphasis added.

[44] Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, 47 Stat. 2074, T.S. No. 847, 118 L.N.T.S. 303.

This convention did not make reference either to the protecting power or to the ICRC, although it did recognize the role of voluntary aid societies in Article 10.

The 1929 Prisoner-of-War Convention, by recognizing the roles of the protecting powers and the ICRC and enumerating some of their activities, had greatly strengthened the legal basis for their humanitarian work. While the protecting power was still constrained by its position as a neutral state to act with "impartial amity," it was now possible to assert that the protecting power could properly exercise a certain amount of initiative in asserting the legal rights of prisoners of war without being subject to charges that it had compromised its own neutrality. Indeed, the protecting power could plausibly assert that, although the provisions of the convention merely set forth the rights of prisoners and the duties of the detaining power to the protecting power, they implied an initiative which the protecting power was expected by the high contracting parties to assume.

The emergence of this right of initiative of the protecting power in matters of humanitarian protection was a critical step in the development of that power's supervisory role in armed conflict, since this right enabled the protecting power to intervene more vigorously on behalf of protected persons, and suggested a distinction between the political functions of the protecting power and its humanitarian concerns. This distinction was to become increasingly clear and important in later years, as will be shown later.

The Second World War may be accurately described as the high-water mark of the application of protecting power supervision to international conflict. Not only had this institution been given a legal basis on which to operate, but it was well suited for use in this conventional, state-to-state conflict characterized by formal declarations of war, organized military forces, and identifiable neutrals. The World War II experience of the protecting powers was significant not only because they were widely utilized, but for at least three other interrelated reasons.

First, the expansion of the conflict into a global war left relatively few neutral states to act as protecting powers for the large number

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This convention relied on enforcement mechanisms to be implemented by the parties to a conflict, such as domestic penal sanctions, military instruction, and enquiries conducted in a manner agreed upon by the belligerents, as stated in chapter VIII, Articles **28–30.** Third-party supervision was not extended to this convention primarily because of the convention's application in the immediate vicinity of the battlefield.

of belligerents.[45] The result was that a protecting power often represented a number of belligerents, some of whom were adversaries. The protecting power's position as "middleman" for both sides in a belligerency allowed it to use effectively the persuasive element of reciprocity to encourage mutual compliance with the law. Thus, the protecting power often became a kind of umpire, rather than remaining merely an agent of one of the belligerents.[46]

A second development built upon the umpiring role. Growing support emerged for the idea that the protecting power, when performing its Geneva convention role, ought to be regarded not as the representative of a particular belligerent, but rather as the representative of the humanitarian interests of the whole body of high contracting parties. This idea, in turn, lent added support to the argument that the protecting power could properly take the initiative in securing the rights of prisoners of war under the 1929 Convention.[47]

The third development related to the scarcity of neutral states was the recognition that in a future war, substitutes might be needed.[48] This problem was also underscored by the requirements of diplomatic recognition which limited the role of the protecting power. Since the activity of the protecting power was subject to the consent of the detaining power, this form of third-party supervision was normally only feasible where both belligerents recognized each other's legal existence as states.[49] Since, for example, the Soviet Union maintained that Poland did not exist, it refused to consent to

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[45] At one time Switzerland was the protecting power for thirty-five belligerents. 3 Commentary, *supra* note 33, at 95 note 2.

[46] *See id.* at 95–96.

[47] "The idea of the private interest of each of the belligerents was replaced by the conception of the overriding general interest of humanity, which demanded such control, no longer as a right, but as a duty." *Id.* at 96.

[48] *See id.* at 111. Towards the end of World War II, Switzerland and Sweden were acting as protecting powers for nearly all the belligerent states.

[49] Views differ, but one is that a belligerent does not have to be a state to request a protecting power. The appointment of the latter would still be subject to the consent of the adversary. Castren, *supra* note 35, at 91. *But see* 3 Commentary, *supra* note 33, at 111: "The exercise of the Protecting Power's functions . . . presupposes the juridical existence and capacity to act of the three parties to the contract." Taken together, these statements suggest that a non-state might be able to utilize a protecting power if its adversary recognized that a state of belligerency or insurgency existed.

protection of Polish interests in the Soviet Union by any neutral state.[50] Furthermore, the protecting power, to be effective, had to maintain diplomatic relations with each belligerent state; and since each power of origin might have numerous adversaries, that condition might not be satisfied as to all of them.

Those concerned about these diplomatic barriers to third-state supervision did not have to look far to find assistance. The ICRC, invoking Article 88 of the 1929 Prisoners-of-War Convention as its legal basis, undertook a prodigious humanitarian effort on behalf of prisoners of war, to include the establishment of a Central Prisoner of War Agency with 40 million index cards, the conduct of 11,000 visits to prisoner-of-war camps, and the distribution of 450,000 tons of relief items.[51] This relief work was performed, as in World War I, in the context of the ICRC's traditional role of humanitarian assistance and not as a substitute for the activities of the protecting powers. Nevertheless, the success of the ICRC suggested that, in future conflicts where state protecting powers might be unable to function, non-state substitutes might be invaluable, and it also brought to mind the ICRC's proposal prior to the 1929 Diplomatic Conference regarding its use in a supervisory role.

111. THE GENEVA CONVENTIONS OF 1949

Even before the end of the Second World War, the ICRC had begun a review of the 1929 Geneva Conventions in light of the wartime experience with a view toward their revision and improvement. The possibility of increasing the effectiveness and scope of third-party supervision in response to the problems encountered in World War II was of major concern. Drafts were prepared with the assistance of experts from various nations, national Red Cross societies, and other reflief organizations. Complete texts were pre-

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[50] **2** L. Oppenheim, International Law **244** (6th ed. Lauterpacht 1944).

Protection is accorded to the interests of a state, as distinguished from those of a government. Thus, in contrast to the Polish question, the situation in Vichy France resulted in American consent to the exercise of good offices by Switzerland on behalf of French interests in the United States, since the United States did not question the existence of France as **a** state, even though it refused to recognize the Vichy government. Franklin, *supra* note 8, at 150–51.

[51] **3** Commentary, *supra* note 33, at 105.

sented to the XVIIth International Conference of the Red Cross at Stockholm in **1948,** and, after amendment, were adopted by the Conference. These draft Conventions became the working documents for the Diplomatic Conference which met at Geneva from **21** April to **12** August **1949** and adopted the four new Conventions in their final form.

Global conflict had illustrated the problems created by a shortage of neutral protecting powers, but, as previously noted, this shortage had also encouraged the development of the concept of the protecting power as an impartial umpire representing the humanitarian interests of the international community. The new conventions responded to World War II experience by making three fundamental changes concerning the role of the protecting power:

First, once a protecting power had been designated (whether in peacetime or after the outbreak of war) by the protected state and approved by its adversary, the protecting power's supervisory role became obligatory.

Second, such supervision was made available in all four conventions.

Third, provision was made for the appointment of official substitutes.

Common Article 8 (Article **9** in Convention IV) has been called the "keystone of the Conventions"[52] and provides for protecting power scrutiny of their implementation:

> The present Convention *shall be applied* with the cooperation and under the *scrutiny* of the Protecting Powers whose *duty* it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

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[52] Yingling and Ginnane, The Geneva Conventions of 1949, **46** Am. J. Int'l L. **393, 397 (1952).**

> The Parties to the conflict *shall facilitate* to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.
>
> The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.[53]

Article 8 of Conventions I and II contains an additional concluding sentence which provides that the protecting powers' activities "shall only be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessities," reflecting the fact that these two conventions have application in or near the combat zone. However, this provision is properly construed not so much as a restriction on the protecting powers as it is a restriction on the justification for limiting their activities. Such limitations must be partial, temporary, and responsive to exceptional circumstances.[54]

The term "protecting power" is nowhere defined in the conventions. Like Article 86 of the 1929 PW Convention, Common Article 8 presupposes the existence of protecting powers in international usage, appointed by each power of origin with the consent of the detaining power concerned. Thus, Article 8 does not concern itself with the consensual procedure for appointment of the protecting power, nor does it affect the traditional functions of the protecting power, such as protection of embassy premises, which have their basis in international custom. However, Article 8, taken together with other provisions of the conventions, does modify the protecting power's position with respect to its functions under the Convention.[55]

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[53] Art. 8, Conventions I, 11, 111, and IV, note 3 *supra*. Emphasis added.
[54] 1 Commentary, *supra* note 33, at 111.

[55] All four Conventions provide in Common Article 11 (Article 12 of Convention IV) that protecting powers may lend their good offices to facilitate resolution of any dispute affecting the interests of protected persons or the interpretation of the provisions of the conventions,

In addition, Conventions I, 111, and IV make specific references to the protecting powers in various articles concerning particular tasks. Representative of these

Under its "Geneva Mandate," the protecting power assumes a mission entrusted to it not only by the power of origin, but by the whole body of high contracting parties to the conventions. Indeed, if the protecting power is a party to the conventions, it is bound by Common Article 1 "to respect and to *ensure respect for* the [conventions] *in all circumstances*."[56] Therefore, its role in the implementation of the humanitarian law of Geneva is no longer limited to the "possible collaboration," referred to in the 1929 Prisoner-of-War Convention, but has become obligatory from the time when the protecting power is designated and accepted by the parties to the conflict.[57] At this point the belligerents, if they are parties to the convention, are also obligated, not only to accept the "scrutiny" of the protecting power, but to demand it.[58] Such a demand ought not be

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tasks are assistance in connection with the trial and sentencing of prisoners of war and civilian detainees; receipt of information upon transfer, evacuation, or deportation of protected persons; assistance with relief shipments; and the right of representatives of the protecting powers (and of the ICRC) to visit places of internment or detention of protected persons.

The enumeration of these tasks does not, however, define the limits of the protecting power's role under the conventions. This was made clear at the Diplomatic Conference, where the words "mission as *defined* in the present Convention" in Article 8 were changed to read "mission *under* the present Convention" to emphasize that the various articles do not attempt to define exhaustively the mission of the protecting powers. This view is also reinforced by Common Article 11, described above, ***See*** 3 Commentary, *supra* note 33, at 98–101.

[56] By undertaking this obligation at the very outset, the Contracting Parties drew attention to the fact that it is not merely an engagement concluded on a basis of reciprocity . . . [but] rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties . . . . The proper working of the system of protection provided by the [Conventions] demands in fact that the States which are parties to it should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that it is respected universally . . . .

This undertaking [Article 1] applies to a Protecting Power which is a party to the Convention as it does to the belligerent Powers.

3 Commentary, *supra* note 33, at 18, 103.

[57] If a protecting power is not a party to the Convention, its mission is only as extensive as it agrees. 2 Commentary, *supra* note 33, at 61 note 2. ***See*** Franklin, *supra* note 8, at 143.

[58] The provision in paragraph 1 of Article 8 concerning approval of protecting power delegates merely reflects the peacetime diplomatic practice whereby a

necessary, however, because Article 8, taken together with Article 1, contemplates that the protecting power will take the initiative in fulfilling its wartime role under the conventions.

Thus, Article 8 represents a significant step forward from Article 86 of the 1929 Prisoners of War Convention. It obligates the protecting power to provide the supervision necessary to insure implementation of the conventions, and requires the parties to the conflict to facilitate, as much as possible, the work of the protecting power. Article 8, in conjunction with Common Article 1, also reinforces the concept of the protecting power as the representative of the community of nations when performing its role under the conventions.

However, Article 8 fails to address the procedure for appointment of protecting powers in time of war. As explained earlier, this was considered to lie within the province of international usage as a three-sided consensual action. Furthermore, the problem in World War II was not the appointment procedure, since most belligerents were quite willing to accept each other's protecting powers. Rather, the fundamental problem was the shortage of neutral candidates, so it is not surprising that the draftsmen focused on the latter problem instead.[59] However, the obligations of both the protecting power and the belligerents to facilitate this system of scrutiny hinge on the three-sided consent needed to appoint the protecting power in the first place. The significance of this customary prerequisite would become all too clear in the post-World War II era.

Common Article 10 (Article 11 of Convention IV) provides for the appointment of an official substitute for the protecting power, either consensually at the option of the parties to the conflict, or

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state may withhold its consent as to particular diplomats or consuls; it is not a license to frustrate the protecting power's efforts. **3** Commentary, *supra* note **33,** at 101–02.

[59] This perspective is reflected as late as the 1960 commentary on Convention III, Article 8:

> The procedure for appointing a Protecting Power is not laid down in the Convention. It is in practice a simple matter . . . . [The enemy Power] cannot refuse all the [Protecting] Powers in turn; that would be entirely contrary to the spirit of the Conventions and to international usage.

Id. at 100–01.

unilaterally by the detaining power when there is no protecting power or it has ceased to function, for whatever reason. This article is a response to both the likelihood of a shortage of neutral states in a global conflict and the possible absence of diplomatic recognition (as between the U.S.S.R. and Poland in World War 11), which would prevent appointment and operation of a protecting power.[60]

Paragraph 1 of Article 10 permits the parties to a conflict to entrust the protecting power's mission under the conventions to "an organization which offers all guarantees of impartiality and efficacy."[61] The organization may be specially created for this purpose. This option grew out of a French proposal at the 1949 Diplomatic Conference for the creation of a permanent international body to supervise the implementation of the conventions.[62] This proposal, like the ICRC's proposal for roving commissions made prior to the 1929 Conference, was ultimately rejected, but provided an impetus for recognition of an official role for non-state third parties as an alternative to state protecting powers.

The organization appointed under paragraph 1 is not a protecting power (since not a state), and its mandate is limited to the "duties incumbent on the Protecting Powers by virtue of the . . . Convention[~],"and therefore does not include the customary political functions which a state protecting power might perform apart from the conventions. Indeed, paragraph 1 makes possible the official division of political and convention functions between a state protecting

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[60] **A** related problem from World War II concerns the role of the protecting power in the case where the government of the power of origin ceases to exist. When Germany capitulated and came under Allied occupation in **1945,** its protecting powers considered that their responsibilities had ended. The better view is that the protecting power represents the interests of a state, not a government. This lessens the possibility that protected persons will be neglected because of a change in governments. See ***id.*** at 101; Franklin, *supra* note 8, at 150–51; note 50 *supra*.

[61] Efficacy refers to adequate financial and material resources and the availability of a qualified staff capable of dealing effectively with the representatives of the states concerned. **3** Commentary, *supra* note 33, at 115–116.

[62] Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, Geneva, 1949, Final Record, Vol. 3, p. 30–31 [hereinafter cited as Final Record]. The Conference adopted a Resolution recommending "that consideration be given as soon as possible to the advisability of setting up an international body" to act in the absence of protecting powers. Resolution **2,** 75 U.N.T.S. 22 (1950).

power and an impartial organization, respectively.[63] As we shall see, this division of functions has much to recommend it, and became a reality in the post-World War II era.

Paragraphs 2 and 3 of Article 10 address the problem of appointing substitutes when there is no protecting power or when it has ceased to function:

> When [protected persons] do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power *shall* request a neutral state, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.
>
> If protection cannot be arranged accordingly, the Detaining Power *shall* request, or *shall* accept, subject to the provisions of this article, the offer of the services of a *humanitarian* organization, such as the International Committee of the Red Cross, to assume the *humanitarian* functions performed by Protecting Powers under the present Convention.[64]

Paragraph 2 was the subject of much debate, misinterpretation, and eventual reservations by a number of states which claimed that it infringed the sovereignty and belligerent rights of the power of origin.[65] The objection basically was that the detaining power should not have the right to appoint a substitute of its own choice without the consent of the power of origin. The basis for this objection is revealed as insubstantial by a careful reading of paragraph 2.

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[63] *See* 3 Commentary, *supra* note 33, at 115.

[64] Note 3, *supra*. Emphasis added.

[65] The reservation of the Soviet Union as to Common Article 10/10/10/11 of the four Conventions is representative:

> The Union of Soviet Socialist Republics will not recognize the validity of requests by the Detaining Power to a neutral State or to a humanitarian organization, to undertake the functions performed by a Protecting Power, unless the consent of the Government of the country of which the protected persons are nationals has been obtained.

75 U.N.T.S. 458 (1950) (reservation made on signature), confirmed in the instrument of ratification, 191 U.N.T.S. 367 (1954). Reservations to Common Article

First, as noted earlier in connection with Article 8, the conventions presuppose the existence of the legal regime of protecting powers, and do not alter the previously developed customary procedure by which they are appointed by the power of origin with the consent of the detaining power. This is why Article 10 makes no mention of the fact that if a protecting power ceases to function, it remains the province of the power of origin to appoint a new protecting power. This is assumed to be s ~ . ~ ~

Paragraph 2 deals only with the appointment of *substitutes*, and therefore only becomes operative if there is no protecting power. This occurred in World War II when, as in the case of Poland, the power of origin was unrecognized by an adversary; or when the power of origin, or at least its government, ceased to exist, as was the case with the German Reich in May 1945.[67]

Thus, this provision does not diminish the customary prerogative of the power of origin to appoint a new protecting power. Furthermore, even where paragraph 2 applies, the detaining power does not have free rein: it *must* request a substitute, and if the substitute is an organization, it must be one "appointed by previous agreement between the [parties to the conflict], and consequently accepted in advance by the Power of Origin."[68] The intended purpose of this paragraph is to expand rather than diminish the protection afforded to citizens of the power of origin.

If neither a new protecting power, organization, nor substitute has been appointed, paragraph 3 of Article 10 then becomes operative, and becomes an automatic "fall-back" provision for services of a humanitarian organization[69] to provide the humanitarian functions performed by protecting powers under the conventions. The lan-

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10/10/10/11 were also entered by ten other European Communist states, the People's Republic of China, North Korea, North Vietnam, and Portugal. *See* Pilloud, *Reservations to the 1949 Geneva Conventions*, 5 Int'l Rev. of the Red Cross 343 (1965).

[66] 3 Commentary, *supra* note 33, at 117.
[67] *See* text above notes 48 through 50, and *see* notes 50 and 60 *supra*.
[68] 3 Commentary, *supra* note 33, at 119.

[69] 1 Commentary, *sicpra* note 33, at 108. The cited authority defines a humanitarian organization as one which is "concerned with the condition of man, considered solely as a human being without regard to the value which he represents as a military, political, professional, or other unit."

guage of this provision is mandatory. The qualification "subject to the provisions of this Article" refers only to the fact that the detaining power may refuse an offer of an organization when it has already secured the services of another, or if the offering organization fails to provide "sufficient assurances" of efficacy and impartiality as required by paragraph 4.[70]

If there is a weakness to paragraph **3,** it is that a decision by the detaining power that an offering organization is not qualified is reviewable only in the forum of world public opinion. However, if the offering organization is the ICRC, which is named in paragraph **3** as an example of a qualified humanitarian organization, then the detaining power may feel considerable political pressure to accept the offer.

Paragraph **3** limits the mandate of the organization to the performance of *humanitarian* functions of the protecting power under the conventions. The conventions thereby make possible the activities of three different types of supervisory bodies, each with a different range of authority. The state protecting power's mandate extends beyond its convention functions to include customary representation of the political and economic interests of the protected state. The organizations appointed under paragraph **1** of Article 10 and the official substitutes of paragraph **2** (whether states or organizations), are limited to the performance of protecting power functions under the conventions. The humanitarian organization which offers its services in the absence of a protecting power or official substitute is limited to those functions of the protecting power under the conventions which are humanitarian in nature.

This distinction reflects the position taken by the ICRC during the 1949 Diplomatic Conference that not all the protecting power's convention functions might be properly performed by a humanitarian organization without jeopardizing its independent humanitarian character. Thus a clear distinction was made between official substitutes and "voluntary helpers."[71] The ICRC's later reassessment of

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[70] 3 Commentary, *supra* note **33,** at 120.

[71] *Id.* at 119. While the ICRC delegate emphasized that a humanitarian organization could not assume the duties of political representation which a protecting power performs apart from the conventions, he did not specify which functions of the protecting power under the conventions were not considered humanitarian in nature. Final Record, vol. 2–B, p. 61, 63; *id.,* vol. 3, p. 30–31.

its position regarding this distinction was to be of considerable significance when the recent efforts to strengthen the system of protecting powers and substitutes began in the late 1960s. The "automaticity" of paragraph 3 regarding resort to humanitarian supervision was destined to become a much-debated issue at the 1975 Diplomatic Conference, albeit in the context of official substitutes rather than unofficial offers of service.

In addition to the role of the ICRC and other humanitarian organizations under Article 10(3), the conventions recognize in Article 9 the traditional relief activities (as distinguished from protecting power functions) performed by such organizations in time of war:

> The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of [protected persons], and for their relief.

This provision is derived from Article 88 of the 1929 Prisoners of War Convention which recognized ICRC activities in World War I. Article 9, while naming the ICRC as an example of a humanitarian and impartial organization, recognizes the contribution that other agencies, such as voluntary aid societies, may make to humanitarian protection of war victims. Their activities must be limited to humanitarian functions not affected by military or political considerations.

The activities of a humanitarian organization under Article 9 are subject to one important condition: the consent of the parties to the conflict concerned.[72] This condition is described as "harsh but inevitable" because of a "state's sovereignty over its territory."[73] Whether such consensual requirements necessarily follow from sovereignty is a recurring issue which, as noted earlier, arose in connection with paragraph 2 of Article 10 concerning the unilateral appointment of substitutes. This same issue underlies the recent

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[72] The parties concerned may include not only the belligerents, but also neutral states through whose territory relief parcels and other material must pass. 3 Commentary, *supra* note 33, at 109.

[73] 1 Commentary, *supra* note 33, at 108.

debate on automatic acceptance of substitutes at the 1975 Conference, which we shall examine in due course.

In any case, since the parties to the Geneva Conventions are bound to carry out and ensure respect for their provisions in all circumstances, the withholding of consent under Article 9 without reasonable grounds (such as an organization's lack of impartiality) would be inconsistent with the spirit, if not the letter of the conventions. Here again, as with Article 10(3), there is no effective review, beyond the scrutiny of public opinion, of a belligerent's decision regarding the qualifications of an organization seeking to provide assistance. This points to the fact that the ICRC, which is the only organization explicitly recognized by the high contracting parties as humanitarian and impartial, is in the best position to render assistance in either situation. The assertion by any contracting party, as offeree, that the ICRC is not qualified to act under either Article 9 or Article 10 would be self-contradictory.

Article 9 makes it clear that the enumerated ICRC functions in the conventions do not define the limits of its humanitarian activities. However, the enumeration of certain functions does strengthen the legal basis for the performance of these tasks. Two of the most important provisions are Article 126 of Convention III and Article 143 of Convention IV, which give both the protecting power and the ICRC the right to send representatives to all places where prisoners of war and civilian detainees may be held. Visits of the ICRC are subject to approval of its delegates by the detaining power, but the presence of the ICRC in principle is as of right. These articles are additional examples of "automaticity'' with respect to third-party activities.[74]

The importance of the ICRC's traditional functions, many of which are explicitly recognized in the conventions,[75] was the primary reason for its cautious approach to the question of its possible role as a substitute for a protecting power. The ICRC did not want

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[74] *See* Forsythe, *Who Guards the Guardians: Third Parties and the Law of Armed Conflict*, 70 Am. J. Int'L. 41, 45 (1976).

[75] Examples include the lending of good offices to facilitate establishment and recognition of safety zones; communication with representatives of prisoners of war; supervision of distribution of collective relief to the civilian population, internees, and prisoners of war; and the recognition of the special position of the ICRC among relief organizations in the field of aid to the protected persons.

to jeopardize its position as an independent, impartial humanitarian body by becoming embroiled in the political controversies with which an official substitute might have to deal.[76] Thus it stressed the distinction between the official substitutes of Article 10(2) and the purely humanitarian role envisioned in Article 10(3), and limited its own commitment to the latter. The ICRC's position in **1949** was that its role was "fundamentally dissimilar"[77] to the role of the protecting power.

The above characterization of the ICRC is not fully supported by a comparison of the enumerated convention functions of the two institutions, since there is some overlap,[78] but it reflects the notion that the protecting power provides a "legal scrutiny," while the ICRC offers a "factual scrutiny".[79] In any case, this distinction between the respective roles of the protecting power and the ICRC was to lose much of whatever significance it originally possessed amidst the post-World War II failure of the state protecting power as a supervisory mechanism.

Up to now, we have examined the roles of the protecting power and the ICRC in the context of international conflict. Indeed, the institution of the protecting power was historically only operative in state-to-state conflicts[80] and the ICRC was founded primarily to aid the victims of interstate warfare. Furthermore, the Hague and Geneva Conventions (until **1949)** applied only to such conflicts. Nevertheless, there developed growing support in the twentieth century for the idea that humanitarian rules should offer protection to the victims of internal conflict as well.[81] The problem, which

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[76] *See* **3** Commentary, *supra* note **33,** at 119–120.

[77] 1 ICRC Report **39,** *as cited in* Levie, *Prisoners of War arid the Protecting* ***Power,*** *55* Am. J. Int'l L. **374, 394** note **50** (1961).

[78] Both the ICRC and the protecting powers have the right to visit places where prisoners of war and civilian detainees are held, to lend their good offices to facilitate institution and recognition of hospital and safety zones, and to assist in the distribution of collective relief.

[79] International Committee of the Red Cross, Documents for the Conference of Government Experts on the Reaffirmation Applicable in Armed Conflicts, Doc. CE/2b at **15 (1971)** [hereinafter cited as Doc. CE].

[80] A limited exception was the use of good offices by the American consul on behalf of British prisoners during the Boer War in South Africa.

[81] *See* Veuthey, ***The Red*** *Cross and Non-International Conflicts,* 10 Int'l Rev. of the Red Cross **411** (1970).

exists to this day, was to define a threshold level of conflict which would differentiate between actual internal or civil conflict and mere riot or brigandage. States were understandably reluctant to be bound to apply an international body of law to the latter situations, if not also the former, especially since such application could be construed as a sign of the recognition or legitimacy of the insurgent force.

In the face of these obstacles, draft Article 2 of the 1949 Conventions presented to the Diplomatic Conference made the Conventions applicable in their entirety in internal conflicts and binding upon both adversaries.[82] This proposal encountered substantial opposition of varying degrees, and the compromise result was common Article 3, often referred to as a "convention in miniature." This provision made certain fundamental humanitarian norms applicable in internal war but did not require application of the conventions in their entirety. This was a significant step, in that the parties to an internal conflict, even if refusing to recognize the existence of an insurgency or belligerency, were nevertheless expected to honor certain fundamental international humanitarian obligations.

As part of this "mini-Convention", there is a "mini-Article 9"; that is, a provision that an "impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict." This provision was a significant victory for the ICRC because it provided a legal basis for the ICRC offer of services in domestic conflict. ICRC interest in such relief work dated at least as far back as 1912, when the first proposals for aid to victims of civil conflicts were presented to Red Cross Societies and later adopted in 1921 at the Xth International Conference of the Red Cross.[83]

The chief obstacles had always been the hostility with which many states viewed such offers of service, and the fear that acceptance of such services would give legal status to the insurgents. States often classified insurgents as criminals rather than combatants, and considered such offers to be attempts to aid criminals and to interfere in their internal affairs. Article 3 may not have dispelled such attitudes, but it plainly gives the ICRC a legal basis for asserting that

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[82] Final Record, vol. 1, p. 47.
[83] Veuthey, *supra* note 81, at 412.

its offer of services cannot legitimately be challenged as an unfriendly act or an improper interference in the state's internal affairs, if the conflict is within Article *3*.

Again, as with Article 9, the organization and its services must be both humanitarian and impartial, and the ICRC is named merely as illustrative of such an organization. There is no obligation on the part of the offeree state or insurgent group to accept the offer, and the final sentence of Article *3* makes it clear that its application, to include the acceptance of an offer of services, does not affect the legal status of the parties to the conflict. This provision was included in an attempt to foreclose the argument that the application of Article *3* would involve political recognition of insurgents.[84]

World War II and the Geneva Conventions of 1949 represent high points in the application and elaboration of the roles of the protecting power and the ICRC in the implementation of humanitarian law in time of war. The articles we have reviewed give legal recognition to the institution of the protecting power as the primary mechanism for implementation of all four conventions, and make provision for substitutes. Further, these articles require that a minimum level of humanitarian services be sought out and accepted when there is no protecting power or official substitute.

The conventions give legal substance to the concept of the protecting power as the representative of the humanitarian interests of the international community. Specific functions of both the protecting power and the ICRC are explicitly recognized, as is the ICRC's traditional humanitarian relief mission; and a legal basis is provided for ICRC services in internal conflict.

Given these developments, one can hardly fault the cautious optimism of the Commentary on the Conventions which observes, in regard to Article 8, that it "is not perfect. But if one thinks of the tremendous advance which it represents in humanitarian law, it can be considered satisfactory."[85] Unhappily, a review of the role of the protecting power in the conflicts which followed the 1949 Conventions will illustrate that the procedures they embody were rarely put into practice.

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[84] 3 Commentary, *supra* note 33, at **43.**
[85] *Id.* at 102.

IV. THE POST-WORLD WAR II ERA: DECLINE OF THE PROTECTING POWER AND EXPANSION OF THE ROLE OF THE ICRC

The Geneva Conventions of 1949 gained widespread acceptance following their adoption by the Diplomatic Conference, until today there are no fewer than 146 high contracting parties.[86] Nevertheless, in this same period there have been over 100 armed conflicts, both internal and international, and in only three instances have protecting powers been utilized.[87] Furthermore, in this widespread absence of protecting power scrutiny there has been no resort to official substitutes, either unilaterally or by mutual consent.[88] The failure of nations to observe the laws of war has been attributed largely to the failure of the system of protecting powers to operate.[89] In response to this state of affairs, the ICRC has assumed an even more prominent role in the implementation of the law of Geneva.

It has been argued that the root cause of this modern neglect of the protecting power is simply that states do not want to have in their territory a neutral presence concerned with compliance with the conventions.[90] This assertion is certainly supported by recent history, but it fails to explain *why* states have recently developed such an aversion to the system of third-party supervision embraced by their delegates in 1949. Recall that in earlier conflicts, dating as far back as the Franco-Prussian War of 1870–71, nations were not only willing, but often anxious to secure the services of a protecting power and equally amenable to the appointment of one by an adversary. This willingness to allow a measure of third-party supervision even extended, in the case of the Boer War, to an essentially internal conflict. The post-Convention turnabout in the attitudes of

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[86] U.S. Dept. of State, Office of the Legal Advisor, Treaties in Force (as of 1 Jan. 1978) 346, 349–50.
[87] J. Pictet, supra note 19, at 66.
[88] Forsythe, *supra* note 74, at 46.

[89] Draper, *The Statics oj Combatants and the Question* of *Guerrilla Warfare,* 45 Brit. Y.B. Int'l L. 173, 213 (1973).

[90] Levie, Some Major Inadequacies in the Existing Law Relating to the Protection of Individuals During Armed Conflict (working paper for the 14th Hammarskjold Forum, New York, March 16, 1970), published in J. Carey, ed., When Battle Rages, How Can Law Protect? 12 (1971).

states concerning protecting power supervision is reflective of changes in the legal, political, and military aspects of modern warfare which have manifested themselves in the post-World War II era.

It should be recognized at the outset that most of the conflicts since 1949 have been non-international insurgencies or civil wars.[91] The system of protecting powers has not "failed" in these situations, since, by the terms of common Articles **2** and **3,** it does not apply (unless the parties to the conflict recognize a state of belligerency or agree to apply the Conventions).[92] The real failure, in this context, is that common Article **3** provides no mechanism for *de jure* supervision in internal conflicts.[93]

Due to the limitation on its applicability, the system of protecting powers has suffered from a marked reluctance on the part of states to take any action which might constitute an admission that they are engaged in an international conflict. The appointment of a protecting power or substitute to carry out its functions under the Geneva Conventions has understandably been viewed as such an admission.

Howard S. Levie, now retired, was a professor at Saint Louis University School of Law and a colonel in the Army Judge Advocate General's Corps. A prolific writer on international law topics, he has completed two books recently which have been noted or reviewed in the *Military Law Review* at 84 Mil. L. Rev. 151 (1979), 86 Mil. L. Rev. 155 (1979), and 88 Mil. L. Rev. 152 (1980). An article by him was published at 23 Mil. L. Rev. 41 (1964). He lives in Newport, Rhode Island, and does research and writing for the Naval War College.

[91] The delegate of the Federal Republic of Germany to the 1975 Diplomatic Conference stated that eighty percent of the victims of armed conflict since World War II owed their suffering to internal wars, citing ICRC sources. Conference Document CDDH/I/SR.23 at 10 (1975).

[92] Recognition of rebels or insurgents as belligerents brings the Conventions in their entirety into play. 2 L. Oppenheim, International Law 370 n. 1 (7th ed. Lauterpacht 1952).

However, there is usually little incentive for a state to grant belligerent status to insurgents, not only because such action acknowledges that they have been, to a certain degree, successful, *see* H. Lauterpacht, Recognition in International Law 176 (1947), but also because reciprocity is usually absent: the insurgents, especially if engaged in guerrilla warfare, can rarely hope to comply even with common Article 3. **An** "open" guerrilla is a dead guerrilla. *See* Draper, *supra* note 84, at 208.

[93] *See, e.g., id.*

While the refusal to acknowledge the existence of an international conflict may be motivated by a desire to deny belligerent status to an adversary for particular political reasons,[94] there also has been a more general concern for the prohibitions on recourse to force found in the Charter of the United Nations.[95] To admit that one is engaged in an international conflict is to raise the question of a violation of the Charter. Furthermore, the Charter alters the traditional concept of neutrality, since it not only prohibits the threat or use of force except in self-defense, but also calls on members to provide military forces when required to carry out United Nations enforcement actions.[96] The collective action of United Nations forces in Korea is an early example of this development.

Once a state has committed troops to an enforcement action, or merely registered a positive or negative vote in the Security Council or General Assembly, its neutrality on that issue is subject to challenge. Indeed, its neutrality may be compromised merely by becoming a member of the United Nations.[97] The number of candidates for protecting power which are both neutral and acceptable to both sides in an international conflict is thereby reduced. And often a state which may be acceptable as a protecting power is more in-

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[94] During the conflict in Vietnam, the North Vietnamese government rejected the ICRC's position that the Geneva Conventions applied, and announced that it did not consider captured American airmen to be prisoners of war. One reason given was that there had been no declaration of war on either side. N.Y. Times, Feb. 12, 1966, at 12, col. 3 (North Vietnamese Ambassador to Egypt), *as cited in* Note, *The Geneva Conventions and the Treatment of Prisoners of War in Vietnam*, 80 Harv. L. Rev. 851, 859 (1967).

[95] Article 2(4) provides:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 51 preserves the right of individual or collective self-defense pending action by the Security Council.

[96] U.N. Charter art. 2, para. 5, and arts. 25, 42–50. The results of the tension between the obsolesence of neutrality contemplated by the Charter and the need to regulate the relations of belligerents and non-belligerents "have been confused, if not chaotic." Norton, *Beyond the Ideology and the Reality; The Shadow of the Law of Neutrality*, 17 Harv. Int'l L.J. 249 (1976).

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> In principle no Member of the United Nations is entitled, at its discretion, to remain neutral in a war in which the Security Council has found a particular State guilty of a breach of the peace or of an act of aggression and in which it has called upon the Member, . . concerned either to de-

terested in performing a mediating or peacemaking role. Its interest in effecting a political solution to the conflict may cause the mediating state to abjure any commitment as a protecting power, since the two roles may encompass conflicting responsibilities.[98]

Given the Charter prohibitions on resort to force, formal declarations of war have become the exception, not the rule.[99] This further complicates the issue of neutrality, since it blurs the traditional legal distinction between war and peace. "Particularly in light of the conflicts that have taken place since **1945,** which have rarely been accepted as wars in the traditional sense of international law, there has been a tendency to replace the concept of war by that of armed conflict."[100] The consequences for protecting power supervision are illustrated by the Sino-Indian conflict of **1962–63.** There was no declaration of war by either side and therefore no severance of diplomatic relations. In these circumstances, China argued, there was no need to appoint a protecting power (despite the fact that neither side permitted the other's diplomats to visit prisoner-of-war camps).[101]

Perhaps one can better emphasize these modern developments by placing them in historical perspective. The system of protecting powers incorporated into the Geneva Conventions was originally an institution of peacetime diplomatic practice, not an integral part of

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clare war upon that State or to take military action indistinguishable from war.

2 Oppenheim, *supra* note 92, at 647. In practice the Security Council is more likely simply to find that there has been a threat to or breach of the peace, rather to assign blame, since the latter determination could involve interminable delay.

[98] Interview with Professor Richard Baxter, Harvard Law School, January 1979. (See first starred footnote, *supra.*) Humanitarian initiatives directed at one side or the other might upset a delicate political compromise if undertaken by the same party that is mediating the dispute.

[99] Even when a declaration of war is made, it may be a qualified one. The Vietnamese Communist Party leadership declared a "war of resistence" against China in defense of the homeland after the 1979 Chinese incursion into Vietnam. N.Y. Times, March **5,** 1979, at 1, col. 3.

[100] Green, *The New Law of Armed Conflict*, 15 Canadian Y.B. Int'l L. 3, 15 (1978).

[101] China used the same argument in prohibiting ICRC visits to Indian prisoners of war. International Committee of the Red Cross, 1963 Annual Report 28 [hereinafter cited **as** ICRC Annual Report.]

the law of war. Its adaptation to the supervision of humanitarian law in armed conflict occurred during a period characterized by conventional, state-to-state wars between highly-organized forces, accompanied by open declarations of war and neutrality. Common Articles 8 and 10 were responsive to the problems encountered in that kind of war. Thus, as is sometimes said of military planners, the delegates to the 1949 Conference prepared for the last war instead of the next one. Just as the Hague Conventions of 1907 provided few ready answers to the questions raised by the use of airpower in World War I, so too the Geneva Conventions of 1949 failed in large measure to anticipate the tragic proliferation of unconventional, often internal conflicts and the erosion of traditional concepts of war, peace, and neutrality which followed in the wake of the largely conventional warfare of 1939-1945.[102]

Nevertheless, the system of protecting powers was not completely abandoned in the post-World War II era. Protecting powers operated in three conflicts,[103] supported by ICRC activities, and a review of these cases will illustrate that the ICRC's role in humanitarian protection became increasingly important, even when protecting powers were also functioning.

The first use of protecting powers under the 1949 Conventions occurred during the Suez crisis in 1956. France and Egypt agreed on the appointment of Switzerland as their protecting power, and Switzerland also served in this capacity as between Egypt and the United Kingdom.[104] Israel sought to appoint the Netherlands as its protecting power, but since Egypt did not recognize the State of Israel, Egypt withheld consent. At this point the ICRC, which was already operating on the basis of common Article 9 and its specific tasks under the Conventions, offered its services to Israel and Egypt pursuant to paragraph 3 of common Article 10. This initial

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[102] *See* J. Bond, The Rules of Riot 31 (1974). Professor Bond is a former Army judge advocate. See Publication Note 4 in "Publications Received and Briefly Noted," this issue, at 172, for biographical information.

[103] The assertion by some commentators, *e g.*, Levie, *supra* note 90 at 58, that the system of protecting powers has never been invoked since 1949 is incorrect. *See* note 87 *supra*. The factual accounts of the Suez, Goa, and Bangladesh conflicts are based on the information provided in Forsythe, *supra* note 74, at 46-47, except where otherwise indicated. The conclusions drawn therefrom are my own.

[104] The United Kingdom was not yet a party to the 1949 Conventions, but agreed to apply them.

test of the "automaticity" of Article 10(3) failed. Israel accepted, subject to reciprocity by Egypt, but the latter did not respond to the ICRC's offer.

This setback for the ICRC under Article 10(3) was to some degree counterbalanced by the fact that the United Kingdom, even though it had a protecting power, asked the ICRC to assist Switzerland in providing protection and aid to British citizens in Egypt.

In 1961, India attacked the Portuguese colony of Goa located 250 miles south of Bombay. India had previously appointed Egypt as its protecting power under customary peace-time practice. When diplomatic relations between India and Portugal were severed, Portugal designated Brazil as its protecting power. The parties consented to each other's appointees. The ICRC again invoked common Article 9 and its specific functions as the legal basis for its relief work. And again it was asked, this time by Portugal, to assist a protecting power in the protection of citizens of the power of origin.

Ten years later, the birth of Bangladesh was preceded by the outbreak of violence in what was then East Pakistan. In July of 1971, Pakistan consented to the ICRC's establishment of a Central Tracing Agency in Dacca for missing persons.[105] The violence in East Pakistan escalated to an international conflict upon the outbreak of hostilities between India and Pakistan in December 1971. The two belligerents, as well as emergent Bangladesh, gave assurances to the ICRC that the Geneva Conventions would be applied,[106] and the ICRC expanded its activities on the basis of Article 9 and its specific tasks.

Both India and Pakistan agreed to the appointment of Switzerland as their protecting power. However, a dispute arose as to the proper scope of the protecting power's activities. Article 45 of the 1961 Vienna Convention on Diplomatic Relations[107] recognized the

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[105] 11 Int'l Rev. of the Red Cross 614–615 (1971).
[106] 12 Int'l Rev. of the Red Cross 87 (1972).

[107] Dated April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.
Article 45. If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

(a) the receiving State must, even in case of armed conflict, respect and

traditional role of third states in the protection of diplomatic premises and interests of a sending state when its diplomatic relations were severed with the receiving state. India maintained that the protecting power's role was limited to the scope of this "Vienna Mandate" and denied Swiss representatives access to Pakistani detainees. Both Switzerland and Pakistan viewed the protecting power's role as clearly including both this traditional role and its **1949** "Geneva Mandate" to supervise the implementation of the Conventions.

To avoid an impasse, Switzerland and the ICRC persuaded the belligerents to agree to a division of functions. Switzerland would carry out the representative tasks of the protecting power as recognized by the Vienna Convention, while the ICRC would provide all possible humanitarian assistance to prisoners of war, detainees, and other victims of the conflict, supported, if necessary, by Swiss diplomatic influence. The results of this division of functions were encouraging: the ICRC made regular visits to prisoners held by Pakistan, India, and Bangladesh, and also to civilian detainees. Seriously wounded prisoners were repatriated from both sides and personal messages and relief items were forwarded to prisoners, detainees, and other war victims.[108] The extensive efforts of the ICRC were especially welcomed by the new nation of Bangladesh, which, since generally unrecognized, was without the services of a protecting power throughout the conflict.

The events in Suez, Goa, and Bangladesh serve to emphasize the contribution of the ICRC to humanitarian protection while at the same time illustrating some of the limitations on the effective operation of the protecting power in modern conflicts. Lack of diplomatic recognition prevented both Israel and Bangladesh from utilizing protecting powers. But even states which did have protecting powers felt obliged to ask the ICRC for additional support; and in the

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protect the premises of the mission, together with its property and archives;

(b) the sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;

(c) the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

[108] 12 Int'l Rev. of the Red Cross **138–145, 199 (1972).**

Bangladesh conflict, the ICRC was able effectively to assume the primary responsibility for the functions of the protecting power under the Geneva Conventions, free from the political considerations which often accompany the traditional functions of the protecting power.

The Bangladesh experience, in particular, emphasizes not only the feasibility of a division of functions between a protecting power and an organization, but also points to the effectiveness of an informal offer of assistance by a non-political body in gaining access to the area of conflict. The ICRC's original activity began with the tracing agency in Dacca, installed prior to the intervention of India. This "thin edge of the wedge," once inserted, provided the basis for a gradual expansion of humanitarian functions as the violence escalated.

In contrast, the attempted introduction of a protecting power often meets threshold barriers of diplomatic recognition, disagreement (as between India and Pakistan) over the proper scope of its activities, and, perhaps most significant, the question whether the conflict is really international so as to fall within common Article 2 and call for the use of protecting powers in the first place. But aside from these specific hurdles, it may simply be more politically palatable for many nations to accept an informal offer of humanitarian assistance from a neutral non-political body than to consent to the presence in their territory of the representatives of another sovereign who may be responsible not only for humanitarian efforts but also for the political and economic interests of the enemy state.

A study of the attitudes of various nations toward third-party scrutiny during recent armed conflicts[109] reveals a general preference for the ICRC over third states, based on a variety of legal, political, cultural, and ideological factors. For example, if communist states remain true to their ideology, they must necessarily question the concept of "true neutrality," since the continuing struggle between the bourgeoisie and the proletariat is as much a reality in so-called neutral states as in belligerent nations.[110] A gov-

[109] R. Miller, ed., The Law of War (1975). This book is based on an eighteen-month study of the application of the law of war to contemporary armed conflict. The study was conducted by Harbridge House, Inc. for the United States Army.

[110] *Id.* at 254.

ernment which seeks to suppress the proletarian revolution within its borders cannot, in theory, be regarded as a neutral by a communist belligerent. A cultural barrier to third-state supervision is illustrated by Indonesia, where Javanese culture places a high value on secretiveness. Just as the word of an important person is not questioned, so too the scrutiny of its actions by a neutral state would be an affront to the dignity of a great nation. However, the impartiality of the ICRC is apparently acknowledged by Indonesia, and since the ICRC is not a state, its presence would be less insulting to national dignity.[111]

Of more immediate concern than ideological or cultural considerations are the concrete legal and political questions already mentioned in connection with the appointment of protecting powers. The ICRC, however, can often avoid these questions simply by not specifying which article of the Geneva Conventions it is invoking as the legal basis for its intervention. If, for example, the parties to a conflict fail to agree that it is of international dimensions, the ICRC can offer its services pursuant to Article **3,** rather than Article **9** or 10. The result, in terms of ICRC activities in the field, is usually similar.[112] The protecting power, of course, does not have this flexibility.

This review of recent international conflicts and the problems associated with appointment of protecting powers therein has been, to be sure, illustrative rather than exhaustive. Nevertheless, three general conclusions may be drawn from this post-World War II experience concerning the continuing evolution of third-party supervision of international conflict.

First, the separation of the protecting power's customary role of political representation from its mission under the Geneva Conventions, and the delegation of that Geneva mandate to a qualified organization like the ICRC, are not only feasible, but also desirable. This division of functions allows the organization to concentrate

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[111] *Id.* at 259–260.

[112] See Forsythe, *supra* note **74,** at 48 n. **22.** In the 1970's, the ICRC has been allowed by the British government to visit detainees in Northern Ireland after agreeing not to make any reference to common Article **3.** "This ICRC presence in a violent situation, without reference to the law of armed conflict, is a common phenomenon." *Id.* at **46** n. **20.**

fully on the humanitarian interests of protected persons, free of many of the political constraints within which the protecting power must operate. The separation of political from humanitarian concerns is not only appropriate in theory, but in fact helps to preserve the neutral and impartial image of the organization so that its activities and recommendations will be more readily accepted.

Second, ICRC supervision and assistance is more readily obtainable than that of a protecting power. An offer of services by the ICRC is legally ambiguous; it does not require an agreement between adversaries on the questions of recognition, insurgency, belligerency, or the international character of the conflict. Furthermore, the ICRC is more readily accepted as neutral than many states, not only because of its past record of service, but because it owes no political allegiance to other states or to international organizations. The combined effect of these factors is that an ICRC offer of services is more readily accepted by states engaged in hostilities than an attempt by one or the other to introduce a protecting power. Furthermore, the ICRC's right of initiative allows it to gain access to victims of war in situations where neither side would entertain the suggestion of appointing or approving a protecting power.

Finally, the post-World War II experience suggests that the ICRC is more effective than most, if not all, protecting powers in encouraging the implementation of the conventions. In two of the three recent conflicts where protecting powers were used, the power of origin called on the ICRC for additional assistance; and in the third instance the ICRC effectively assumed the entire convention role. This should come as no surprise. Considering the ICRC's long history of leadership in the development and implementation of humanitarian law, it possesses the greatest accumulated expertise of any third-party supervisor in the actual application of the conventions in the field.[113]

Thus far, we have focused on the problems of third-party supervision in recent international conflicts, having noted at the outset that

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[113] The Secretary-General of the United Nations has acknowledged the ICRC to be the most effective private organization concerned with respect for human rights in armed conflicts. Respect for Human Rights in Armed Conflicts: Report of the Secretary-General, 24 U.N. GAOR, 1 Annexes (Agenda Item 61) 1, U.N. Doc. A/7720 (1969), para. 226.

the system of protecting powers normally applies only to conflicts which fall under common Article 2.[114] But because of the proliferation of internal conflicts since 1949, this limitation on the applicability of the system of protecting powers made it unavailable to the majority of war victims. This fact, coupled with the absence of any obligatory mechanism of supervision under common Article 3, constitutes a major weakness of the 1949 Conventions.[115]

The frequency and intensity of internal wars, the use of guerrilla tactics, and the concurrent failure or absence of third-state supervision in most conflicts provided the international community with convincing evidence that the law of Geneva was in need of modernization, and specifically that mechanisms for implementation of the law needed strengthening. And while attention was directed to a number of forces for compliance, such as domestic criminal sanctions and military training, the advantages of third-party supervision were recognized. It interjects into the process a neutral advocate of humanitarian interests who is not compromised by military responsibilities. Further, it does not present the threat of escalation of violence that inheres in other methods, such as reprisals. Finally, it is effective regardless of who is winning or losing.[116]

There was renewed interest among commentators in the idea of establishing non-state third-party supervision through the use of organizations created for that purpose, reminiscent of the proposals made prior to the 1929 and 1949 Conferences which resulted in the option provided by common Article 10(1). Professor Levie suggested the creation of a special body composed of internationally-respected individuals to monitor and enforce the laws of war.[117] The

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[114] The system applies to a conflict which would not otherwise fall under Article 2 if a state of belligerency is recognized, or if the parties agree to apply the conventions as a whole. *See* note 92 *supra*.

Ad hoc agreements by belligerents to apply the conventions to what were initially viewed as internal conflicts were made in the Congo (1960–64), the Yemen (1963–67), and in Nigeria (1967–70). *See* Forsythe, *Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts*, 72 Am. J. Int'l L. 272, 275 (1978).

[115] *See*, e.g , Draper, *supra* note 89, at 208.

[116] F. Kalshoven, The Law of Warfare 115 (1973).

[117] Professor Levie proposed the creation of an International Commission for Enforcement of Human Rights in Armed Conflicts (ICEHRAC) which would become

United Nations also exhibited iscreased interest and support for efforts to improve humanitarian protection in time of war. A report issued by the Secretary-General in 1969 stressed the need to strengthen means of implementation,[118] and the General Assembly adopted a number of resolutions dealing with respect for human rights in armed conflicts.[119]

In September 1969, the XXIst International Conference of the Red Cross, meeting at Istanbul, unanimously adopted a resolution requesting the ICRC actively to pursue its efforts toward modernization of the law of war with a view to drafting rules to supplement the existing law, and to invite government experts to meet in consultation with the ICRC on such proposals.[120] On the basis of this resolution, the ICRC convened the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts on 24 May 1971. A second session met in May and June of 1972 and was attended by over four hundred experts from seventy-seven nations and by representatives of the Secretary-General of the United Nations.

On the basis of its own work, liaison with the United Nations, and the work of the Conference of Government Experts, the ICRC prepared two Draft Protocols[121] supplementing the Geneva Conventions. These drafts served as a basis for the work of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts which convened at Geneva in 1974.

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operative automatically when the parties to a conflict fail to select a protecting power or substitute. Levie, *supra* note 90, at 14.

A similar proposal was made in the U.N. Secretary-General's Report (Note 113 *supra*), but was based on an offer of services like that in common Article 10(3). U.N. Doc. A/7720, *supra* note 113, para. 216.

[118] U.N. Doc. A/7720, *supra* note 113, para. 202–227. *See* notes 113 and 117, *supra*

[119] *E.g* , G.A. Res. 2673–2677, *25* U.N. GAOR, Supp. (No. 28) *76–77,* U.N. Doc. A18028 (1970).

[120] Resolution XIII, Doc. CE/lb, *supra* note 79, Annex III.

[121] Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts [Draft Protocol I]; Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [Draft Protocol II]; both published in ICRC, Draft Additional Protocols to the Geneva Conventions of August 12, 1949 (1973).

V. THE SYSTEM OF PROTECTING POWERS AND THE ROLE OF THE ICRC AS SUPPLEMENTED BY THE PROTOCOLS

When the Diplomatic Conference convened in Geneva in **1974** to consider the ICRC's Draft Protocols, there already existed a general consensus that the system of protecting powers and substitutes should be strengthened.[122] No one at the Conference of Government Experts had gone on record as calling for its abolition.[123] In fact, many states expressed particular concern for improving this mechanism of supervision.[124] But beyond this general agreement that the system should be revitalized rather than interred, many of the principal issues which grew out of the post-World War II failure to apply the protecting power system remained unresolved. These issues may be summarized as follows.

The most prominent issue was that of "automaticity," both as to protecting powers and substitutes. Should belligerents be required to accept protecting powers appointed by their adversaries? If not, should they be required to accept the offer of an impartial body to serve as a substitute? Closely tied to the latter question was the issue concerning the proper scope of ICRC activities if it were to act as an official substitute, and whether the ICRC was willing to be thrust upon the parties to the conflict in that capacity.

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[122] Item **1** on the list of subjects submitted to the Conference of Government Experts, and attached to the ICRC's letter of invitation, concerned measures intended to reinforce the implementation of law, including the system of protecting powers and substitutes. Doc. CE/lb, *supra* note **79,** Annex I at **1.** Response to the questionnaire distributed by the ICRC prior to the Conference indicated three general positions:

1. maintaince of the existing system without change;

2. supplementation of the system with improved appointment procedures; and

3. addition of new supervisory bodies.

Alternative **2** had the broadest support, and there was also general support for strengthening the role of the ICRC. Doc. CEiComm. IV, *supra* note **79,** at **6.**

[123] ICRC, Draft Additional Protocols to the Geneva Conventions of August **12, 1949,** Commentary **12 (1973)** [hereinafter cited as Draft Commentary].

[124] *See*, e.g., Report of the U.S. Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts **25–26 (1974).**

A second general concern was whether the role of substitute should be open to a number of organizations, or only to the ICRC; or whether the ICRC should have some sort of priority in offering its services. The possible role of United Nations organs become an important consideration in this context.

A third issue was that of defining the proper extent of protecting power activities, to include whether the protecting power should act in an investigatory and public reporting capacity, and whether it should extend its scrutiny to supervision of the actual conduct of hostilities.

A fourth problem concerned the effects of continued diplomatic relations and questions of recognition on the operation of the protecting power system. Specifically, there was a desire to clarify whether the appointment of a protecting power constituted recognition of the juridical existence of an adversary, and whether continued diplomatic relations constituted a barrier to such appointment.

Finally, there remained the long-standing question of supervision in internal conflicts. The established rule that the protecting power system did not apply to non-international conflicts was not seriously challenged. But there remained the question whether parties to such conflicts ought to be required to accept an offer of services by the ICRC or a similar organization — another aspect of the more general issue of automaticity.

A review of the efforts of the Diplomatic Conference to resolve these issues will serve as a basis for our inquiry concerning the contribution of Protocols I and II to the system of the protecting powers and the role of the ICRC in the implementation of the humanitarian law embodied in the conventions and their new offspring. However, two preliminary observations are necessary.

First, the protocols, both in draft form and as finally adopted by the Diplomatic Conference, represent an effort to *supplement* rather than to pre-empt or abrogate the existing law of Geneva.[125] This was universally understood from the outset. Any attempt to

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[125] "This Protocol . . . supplements the Geneva Conventions of 12 August 1949 . . . ." Protocol I, *supra* note 6, art. 1(3). Protocol II "develops and supplements

restructure rather than to build upon the conventions would have created the danger of destroying the existing consensus on humanitarian law represented by four of the most widely acceded-to treaties in international law. Therefore, as we examine the results of the recent debates, it should be remembered that the pertinent articles of the Geneva Conventions concerning the roles of the protecting power and the ICRC will continue to apply between the high contracting parties. It must be recognized, however, that even an effort to "supplement" the conventions necessarily involved some overlap and modification of pre-existing law.

A second introductory remark is necessary concerning the significance of the results of the recent conference. This effort to supplement humanitarian law was nearly derailed at the initial session in 1974 by prolonged political quarreling over the propriety of allowing so-called "national liberation movements'' to participate and the related issue of whether "wars of national liberation" should be included as international conflicts under Protocol I.[126] The amount of political wrangling generated by these issues resulted in the adoption by Committees of only five and two-thirds of the 137 articles presented to the Conference at the 1974 session.[127] The political floodwaters subsided enough in subsequent sessions to allow the Conference to complete its work by 1977, but nevertheless had a significant impact on the debates and the final results. In a very real sense the protocols represent a contemporary political consensus defining the limits of modernization of humanitarian law, and proposals for further reform must be viewed with an eye toward their political feasibility.

Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application . . . ." Protocol 11, *siipra* note 6, art. 1(1).

[126] *See* Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law,* 16 Harv. Int'l L. J. 1 (1975).

[127] *Id.,* at 124. International conflicts as defined by Protocol I include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . . ." Protocol I, supra note 6, art. 1(4).

This provision was directed against colonial Portugal's former holdings, Israeli occupation of the West Bank, and the internal policies of South Africa and Rhodesia. It relies on subjective determinations and suggests a return to the concept of *bellum iustum,* so productive of wartime excesses in past centuries. *See* Baxter, *supra* note 126. *But see* Abi-Saab, *Wars of National Liberation and the Laws of War,* 3 Annales d'Etudes Internationales 93 (1972), which makes a legal argument supporting the application of the conventions to such conflicts,

Debate on the further development of the system of protecting powers and substitutes proceeded on the premise that this system should continue to play a central role in the implementation of the law. There was disagreement, however, on the proper scope of the protecting power's activities. Some experts had argued that the protecting power's authority included investigation of alleged breaches of the law and public reporting of such incidents.[128] The ICRC, while agreeing that protecting power functions might include tasks other than those enumerated in the Conventions and Protocol I, stressed that these tasks did not include formal inquiry and reporting. The ICRC's position, in turn, increased support for the creation of a separate fact-finding body. Ultimately, provision was made for the establishment of an international fact-finding commission to enquire into grave breaches and other serious violations in Article 90 of Protocol I, subject to the acceptance of its jurisdiction by the high contracting parties. The establishment of a separate organization to perform the functions of the protecting power was rejected.[129]

The ICRC also emphasized that Protocol I did not extend protecting power supervision to the conduct of hostilities, perhaps in an effort to avert opposition to the protocol and to the strengthening of the system of third-party supervision. This question arose because part III, section I (Methods and Means of Combat) and part IV, section I (General Protection against Effects of Hostilities) of Draft Protocol I related to the actual conduct of military operations. The ICRC's position was that Geneva Conventions I and 11, and part II of Convention IV (General Protection of Populations), which apply mainly to the battlefield and its immediate surroundings, determined the role played by the protecting powers in this area, and that this role would not be expanded under the above-named sections of Protocol I.

The ICRC's position was based on the premise that the **1949** Conventions did not go further than to reaffirm tasks that had originally been conferred upon the protecting powers in time of war by inter-

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[128] Doc. CEiComm. IV, *supra* note 79, at 7.
[129] Doc. CE/II Commentary, *supra* note **79,** at 17–18. Article 10 of the 1972 draft of Protocol I was reserved for the creation of a "permanent body" to serve as a replacement for protecting powers. *Id.* at **24–26.** However, this alternative was not pursued and was not included in Draft Protocol I as presented to the 1974 Diplomatic Conference.

national custom and usage.[130] This position is reinforced by the final version of Protocol I, which identified specific protecting power functions only in Articles 11 (Protection of persons), 33 (Missing persons), 45 (Protection of persons who have taken part in hostilities), 60 (Demilitarized zones), and 84 (Rules of application), none of which suggest direct supervision of the conduct of military operations.

The heart of the controversy over the proper remedy for the contemporary failure to apply the system of protecting powers was the issue of automaticity. However, after the initial discussions of the Conference of Government Experts, the prevailing view was that the appointment of the protecting power should remain subject to the consent of the detaining power, the power of origin, and its nominee. This was in recognition of the protecting power's origins, the independent existence of the institution in international custom, and the fact that the Geneva Conventions of 1949, as well as the 1961 Vienna Convention on Diplomatic Relations, did not seek to alter that status.[131]

The objective of the Diplomatic Conference in 1975 was to agree on procedural mechanisms which would make more likely the success of the consensual process of appointment.[132] To that end, the first three paragraphs in Article 5 (Appointment of Protecting Powers and of their substitute) of Protocol I reaffirm the obligation of belligerents to select protecting powers, and provide for the assistance of an impartial organization to avoid an impasse:

> 1. It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers, including *inter alia* the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict.

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[130] Draft Commentary, *supra* note 123, at 9. See also Doc. CE/lb, *supra* note 79, at 32–33.
[131] Doc. CEiComm. IV, *supra* note 79, at 6.
[132] *See* Draft Commentary, *supra* note 123, at 13; note 122, *supra*.

> **2.** From the beginning of a situation referred to in Article 1, each Party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and this Protocol and shall, likewise without delay and for the same purpose, permit the activities of a Protecting Power which has been accepted by it as such after designation by the adverse Party.
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> **3.** If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article 1, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent. For that purpose it may *inter alia,* ask each Party to provide it with a list of at least five States which that Party considers acceptable to act as Protecting Power on its behalf in relation to an adverse Party and ask each adverse Party to provide a list of at least five States which it would accept as the Protecting Power of the first Party; these lists shall be communicated to the Committee within two weeks after the receipt of the request; it shall compare them and seek the agreement of any proposed State named on both lists.

These provisions, while emphasizing both the duty of the parties to the conflict to apply the system of protecting powers[133] and the duty of the protecting powers to safeguard the parties' interests, explicitly recognize that the appointment process is consensual.

The reference to the ICRC in paragraph 3 raised the "ICRC monopoly" issue which also surfaced in connection with the appointment of official substitutes. The draft version of paragraph 3 provided that "the International Committee of the Red Cross shall offer its good offices . . ."[134] but made no mention of other organizations. Some delegations objected to this approach as excluding other organizations which might be capable of assisting. The ICRC dele-

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[133] Paragraph 1 of Article 5 did not exist in the ICRC draft. It originated in Working Group A of Committee I. Conf. Doc. CDDH/I/284, at 9.
[134] Draft Protocol I, art. 5, para. 2.

gate made it clear that the ICRC did not consider itself a monopoly: it had not referred to other organizations in the draft due to the difficulty of describing such organizations in general terms.[135] The result of this controversy was the addition of the phrase referring to the right of any other impartial humanitarian organization to assist.

Paragraphs 1, 2, and 3 of Article 5, as adopted, were well received by the delegates. The duty to resort to protecting powers in time of conflict had been made explicit, and an orderly procedure for facilitating their consensual selection had been established to supplement the provisions of common Article 8 of the 1949 Conventions.[136]

There was noticeably less enthusiasm for the final version of paragraph 4 of Article 5, which deals with the appointment of substitutes in cases where the procedures in paragraphs 1 to 3 fail to produce a protecting power. Paragraph 4 was the central focus of the automaticity issue, and was the most extensively debated provision of Article 5.

The origins of the debate take us back to the provisions of common Article 10 of the 1949 Conventions. A distinction was there drawn between official substitutes, which would perform all pro-

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[135] While objections to the ICRC "monopoly" were purportedly based on the humanitarian interest in securing all available assistance, the underlying motives appear to have been political.

The delegate of the Democratic Republic of Vietnam questioned the impartiality of the ICRC, Conf. Doc. CDDHIIISR. 17, at 11, apparently because of the Committee's repeated efforts to gain access to prisoners held there during the Vietnam conflict. **See** Forsythe, *supra* note 74, at 53. The ICRC is not well regarded in Africa because it is European and white. R. Miller, *supra* note 109, at *263.* It has been politically attacked in Africa for its relief efforts. The Peoples Republic of China referred to the ICRC as "a tool of United States imperialism" during the Korean War. *Id.* at 242. In contrast, the Swiss delegation to the Diplomatic Conference would have preferred that the ICRC be given some priority under Article 5. Conf. Doc. CDDH/I/235/Rev. 1, at 4.

A list of bodies other than the ICRC which have provided supervision of the application of the law of armed conflict is found in Doc. CE/2b, at 22 n. 55, and includes, among others, Amnesty International, Commission medico-juridique de Monaco, International Commission of Jurists, International Committee of Military Medicine and Pharmacy, International Law Association, and the World Veterans Federation.

[136] *See, e.g.*, Conf. Doc. CDDHIIIDR. 28, at 5 (Switzerland).

tecting power functions under the conventions, and humanitarian organizations such as the ICRC. The latter, due to their character, could perform only those functions of the protecting power under the conventions which were humanitarian in nature. The "automaticity" of Article 10 was limited to the offer of humanitarian services in paragraph **3.** Paragraph **2** of Article 10, while imposing a duty on the detaining power to seek out official substitutes, did not require it to accept the offer of any particular state or organization and, at the time of its adoption, the ICRC was not, by its own terms, one of the candidate organizations under paragraph **2.**

However, shortly after the conclusion of the 1949 Conference, the ICRC announced that it was, in principle, prepared to become an official substitute. But the committee again felt obliged to make some reservations as to detail, and stated that it would normally undertake only the more "specifically humanitarian" tasks of the conventions, being still very much concerned about jeopardizing its traditional relief role as recognized by common Article 9.[137]

During the Conference of Government Experts in 1971, the ICRC delegate announced that the committee had recently reconsidered this question and concluded that all the tasks falling to the protecting power under the conventions could be considered humanitarian. Therefore, the ICRC was prepared to assume a full-fledged role as an official substitute.[138] However, there was still one qualification, which was emphasized at the final plenary meeting of the Conference of Government Experts: the ICRC did not wish to have the role of substitute automatically imposed on it. "Only when all other possibilities were exhausted would the ICRC offer its services. Any such offer would then require the agreement of the Parties concerned."[139] Behind this qualification was not only a desire to remain

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[137] Doc. CD/2b, *sicpra* note 79, at 15. The ICRC offered itself to Egypt, Jordan, Lebanon, Syria, and Israel as an official substitute in the Middle East conflict in September 1972, but there was no affirmative response from any of the Parties. 1972 ICRC Annual Report *supra* note 79, 69–70.

[138] Doc. CEiComm. IV, *supra* note 79, at 2. "[I]n case of need, the ICRC will do everything possible . . . to be the substitute of a defaulting Protecting Power, with the agreement of the two parties concerned." Doc. CE/2b, at 15(statement of the representative of the ICRC).

[139] 1 ICRC, Report on the Work of the Conference of Government Experts, para. 5.46, as *cited in* Draft Commentary, *supra* note 123, at 13.

independent but also the ICRC's position that "it would only become a substitute if this did not hinder its own traditional activities."[140] The committee's position regarding its role as an official substitute was reiterated at the Diplomatic Conference.[141]

Given the ICRC's desire not to be thrust upon the parties to a conflict, certain experts had proposed the creation of an automatic "fall-back" institution to provide third-party supervision in the absence of both protecting powers and other substitutes. This proposal failed to gain support at the Conference of Government Experts and was not included in Draft Protocol I presented to the Diplomatic Conference. One reason for its demise was that the proposal relied on the United Nations to designate the "fall-back" institution. Doubt was expressed by many experts as to the impartiality of United Nations organs.[142]

Faced with its own position that it did not want to be thrust upon belligerents, but recognizing the desirability of some form of safety-valve if the appointment procedure for protecting powers failed, the ICRC prepared two versions of Draft Article 5(3) (to become final Article 5(4)) governing the appointment of substitutes:

Proposal I

> If, despite the foregoing, no Protecting Power is appointed, the International Committee of the Red Cross may assume the functions of a substitute within the meaning of Article 2(e),[143] provided the Parties to the

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[140] *Id.*

[141] Conf. Doc. CDDHIIISR. 17, at 6.

[142] Doc. CEiComm. IV, *supra* note **79,** at 2. **As** an alternative to a U.N.-sponsored body, the Norwegian representative to the Conference of Government Experts proposed the organization of ad hoc supervisory teams trained on a national basis and composed of one representative of the national Red Cross, one international lawyer, and one representative from an international nongovernmental organization of high standing, such as the International Commission of Jurists. Such teams would then be registered with the ICRC or the United Nations. *Id.* at 9.

[143] Draft Article 2(e) of Protocol I defined "substitute" as "an organization acting in place of a Protecting Power for the discharge of all or part of its functions."

> conflict agree and insofar as those functions are compatible with its own activities.
>
> *Proposal II*
>
> If, despite the foregoing, no Protecting Power is appointed, the Parties to the conflict shall accept the offer made by the International Committee of the Red Cross, if it deems it necessary, to act as a substitute within the meaning of Article 2(e).

Proposal I is clearly non-automatic. It explicitly recognizes the independence of the ICRC and its concern for its traditional activities, and states that the ICRC's role as a substitute is subject to the Parties' consent.

Proposal II appears, on its face, to be automatic, in that the Parties "shall accept the offer" made by the ICRC "to act as a substitute". It must be emphasized that this is not merely the offer of services in an unofficial capacity contemplated by common Article 10(3). Rather, we are concerned here with official substitutes. This distinction seems to have been often overlooked (or regarded as insubstantial) during the debates over automaticity,[144] perhaps because the same organization, namely the ICRC, was to do the offering in both instances. Nevertheless, draft Article **5** represented an extension of the ICRC's role from that of "voluntary helper" to official substitute.

Thus, Proposal II appears to extend automaticity to the appointment of official substitutes. In fact, this is not the case. The ICRC, having made clear that it did not wish to be appointed without the parties' consent, also made it known that it would not make an offer under Proposal II unless it had first determined that the parties to a conflict were willing to accept the offer.[145] Furthermore, the ICRC was not bound to offer itself unless it "[deemed] it necessary." The strength of Proposal II was therefore not that it was automatic, but only that its language suggested more of an obligation than the language of Proposal I, and might create more political pressure on belligerents to indicate their willingness to accept an offer made by the ICRC.[146]

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[144] *See, e.g.*, Conf. Doc. CDDHIIISR. 28, at 1 (Egypt).
[145] Conf. Doc. CDDHIIISR. 17, at 7 (ICRC).
[146] *See* Conf. Doc. CDDHIIISR. 19, at 3 (Australian).

While a number of states strongly supported extending the automaticity of common Article 10(3) to the appointment of official substitutes, there was unyielding opposition to this, notably by the Communist states which had entered reservations to Article 10 in 1949. They argued that automaticity infringed upon national sovereignty.[147] The result was that many adherents of automaticity eventually supported Proposal II as a compromise, since it was the 'stronger proposal on its face and was perhaps the best they could hope for, given the political realities of the situation.[148]

After lengthy negotiations, Working Group A of Committee I agreed upon a text which was sent to the Committee and adopted substantially in its final form. During these negotiations, a proposed paragraph **4** *bis* offered by proponents of automaticity was rejected. This proposal would have allowed the United Nations to designate a body to undertake the functions of a substitute as a last resort.[149] This approach was opposed by many Western nations, including the United States. These nations characterized the United Nations as a political organization and felt its involvement was therefore inconsistent with purely humanitarian concerns. Indeed, the United Nations delegate himself expressed reservations as to whether the United Nations could carry out such a responsibility consistent with the Charter. The eastern European nations opposed paragraph **4** *bis* with the same argument about sovereignty that they invoked concerning automaticity in general.[150] Article 4 *bis* was also attacked on the grounds that it threatened to upset the delicate and hard-won compromise achieved on paragraph 4, and might have resulted in reservations similar to those made to Article 10 in 1949.[151]

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[147] *E.g.*, Conf. Doc. CDDHIIISR. **17,** at 11 (U.S.S.R.).
[148] The Canadian delegate viewed the consent provisions adopted in Article 5 as a "recognition of political realities." Conf. Doc. CDDHISR. 37, at 2.

[149] Proposed paragraph 4 *bis* read as follows:

> If the discharge of all or part of the functions of the Protecting Power . . . has not been assumed according to the preceding paragraphs, the United Nations may designate a body to undertake these functions.

Conf. Doc. CDDH/I/284, at 13. Paragraph **4** *bis* was the result of a compromise between the Arab states who desired automatic acceptance of the ICRC, ***see*** Conf. Doc. CDDH/I/75, and Norway, which favored a United Nations role in the supervision of Protocol I. ***See*** Conf. Doc. CDDH/I/83.

[150] Forsythe, *supra* note 74, at 54–55.
[151] Conf. Doc. CDDH/I/284, at 13.

Article 5 was adopted by consensus at the thirty-seventh plenary meeting of the Conference. Paragraph **4** reads as follows:

> 4. If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict; every effort shall be made by the Parties to the conflict to facilitate the operations of the substitute in the performance of its tasks under the Convention and this Protocol.

The framework of Proposal II is still discernable, notably in the provision that the parties "shall accept . . . an offer which may be made" by the ICRC. As with paragraph **3,** there is no ICRC monopoly. The requirements of impartiality and efficacy for other organizations are consistent with Article 10 of the Geneva Conventions. The urgency of the situation under paragraph **4** is emphasized by the insertion of "without delay" in the first sentence. The reference to "due consultation" reinforces the ICRC's position that it will not offer itself unless the parties have already indicated that they will accept. In this regard, the final sentence explicitly referring to consent is relatively innocuous. As a practical matter it adds nothing given the ICRC's present position as to when it will make an offer.[152] The final phrase in paragraph **4** is similar to that found in Article 8(2) of the 1949 Conventions.

Paragraph 4 was criticized during the conference for failing to provide a "water-tight" system for third party supervision.[153] It was feared that the consent provision of paragraph **4** might retroactively weaken Article 10(3) of the Conventions.[154] The most extreme view of Article **5** as a whole was that it made no contribution

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[152] *See* Conf. Doc. CDDH/I/SR. 28, at **12** (United States).

[153] Conf. Doc. CDDH/SR. **37,** at 11 (Egypt).

[154] Conf. Doc. CDDH/I/SR. 28, at **2.** This fear was expressed by the Egyptian delegate. who later emphasized that Article 5 must not be read to weaken common Article 10(3) retroactively. Conf. Doc. CDDHISR. **37,** at **12.**

to the development of the Geneva system because of its dependence on the consent of the parties.[155] Other delegates were more charitable, noting that the requirement for consent under paragraph 4 was a recognition of political reality. These delegates emphasized the contribution of the procedural mechanism of paragraph 3 to the development of the system of protecting powers.[156]

Article 5 also removes two obstacles to the appointment of protecting powers which figured prominently in post-World War II experience. Paragraph 5 eliminates questions of recognition or legal status as reasons for refusing to employ protecting powers, and paragraph 6 affirms that neither maintenance of diplomatic relations nor the use of a protecting power in the traditional diplomatic sense precludes the appointment of a protecting power for the purposes of the 1949 Conventions and Protocol I.[157]

At this point we may recapitulate the answers provided by Protocol I to the issues presented at the beginning of this discussion.

The automaticity of common Article 10(3) of Geneva was not extended to the appointment of either protecting powers or substitutes. In that regard, the ICRC made clear that it did not choose to

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[155] *Id.* at 1 (Syria).
[156] *E.g.*, Conf. Doc. CDDH/SR.37, at 10 (Belgium); note 148, *supra*.

[157] The provisions of paragraphs 5 and 6 follow:

> 5. In accordance with Article 4, the designation and acceptance of Protecting Powers for the purposes of applying the Conventions and this Protocol shall not affect the legal status of the Parties to the conflict or of any territory, including occupied territory.
>
> 6. The maintenance of diplomatic relations between Parties to the conflict or the entrusting of the protection of a Party's interests and those of its nationals to a third State in accordance with the rules of international law relating to diplomatic relations is no obstacle to the designation of Protecting Powers for the purpose of applying the Conventions and this Protocol.

The final paragraph (7) of Article 5 provides that "any subsequent mention in this Protocol of a Protecting Power includes also a substitute."

Article 4, mentioned in paragraph 5, states that the application of the conventions and Protocol I shall not affect the legal status of the parties to the conflict.

The phrase "rules of international law relating to diplomatic relations" in paragraph 6 refers to Article 45 of the 1961 Vienna Convention on Diplomatic Relations, *supra* note 107.

be thrust upon the parties of a conflict without their consent, and without the decision of the ICRC itself to act. The role of substitute was extended, but not confined, to the ICRC. However, the involvement of United Nations organizations or their selectees was disfavored, and the idea of automatic action by the United Nations was rejected.

The scope of the protecting power's activities remained essentially as previously defined by customary diplomatic practice and the mandate of the Geneva Conventions.[158] Its role was not extended to include supervision of the conduct of hostilities or formal investigative and reporting functions.

Finally, questions concerning diplomatic recognition and continued diplomatic relations were removed as plausible reasons for failure to resort to the system of protecting powers.

The remaining problem, which directs our attention to Protocol 11, concerns supervision of the implementation of humanitarian law in internal conflicts. Given the number and severity of these conflicts in the Post-World War II period, the need for such supervision had become more urgent than the drafters of the **1949** Conventions could have foreseen.[159]

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[158] The terms "protecting power" and "substitute" were defined under the law of Geneva for the first time in Article **2** of Protocol I;

> (c) "Protecting Power" means a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol.
>
> (d) "Substitute" means an organization acting in place of a Protecting Power in accordance with Article **5.**

Most of the government experts were in favor of including such definitions in the new protocol, and the same consensus carried forward to the diplomatic conference.

There was, however, criticism of early drafts which had referred to the existence of diplomatic relations between the designated neutral state and the parties to the conflict as a prerequisite to its role as a protecting power, in accordance with customary practice. This requirement was eliminated prior to the diplomatic conference. In addition, the words "has agreed to carry out" were substituted for more subjective terms like "able" or "is prepared." Draft Commentary 8; Conf. Doc. CDDHIIISR. **7,** at 9.

[159] What may not have been foreseen by the framers of the Geneva Conventions was that [common Article 3] would assume an importance almost

Protocol **11,** as presented in draft form to the Diplomatic Conference, was intended to apply to all armed conflicts not covered by common Article **2** of the **1949** Conventions, "taking place between armed forces or other organized armed groups under responsible command."[160] This relatively broad field of application was coupled with a fairly extensive set of legal obligations expressed in forty-seven articles. However, this draft, after further elaboration during the **1975** and **1976** sessions of the Diplomatic Conference, was completely revised in **1977** when it became evident that numerous delegations felt that the extensive provisions and scope of Protocol II intruded too deeply into the internal affairs of states.[161] The result was a shortened Protocol of twenty-eight articles which apparently has a narrower field of application than common Article **3.** That is, the threshold of organized violence required for the application of Protocol II is much higher than that for Article 3.[162] Thus, the contribution of Protocol II to the alleviation of suffering in internal war may depend to a great extent on how high its threshold of violence is set by future state practice.

Even if Protocol II is given wide application, perhaps even coterminous with Article **3,** it fails to reaffirm the legal recognition of the

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transcending the remainder of those Conventions applicable to international armed conflicts.

Draper, *supra* note 89, at **208.**

[160] Draft Protocol II, *supra* note 6, art. **1,** para. **1.** Such conflicts would not include "situations of internal disturbances and tensions, ***inter alia*** riots, isolated and sporadic acts of violence and other acts of a similar nature." *Id.*, art. 1, para. **2.**

[161] *E.g.*, Conf. Doc. CDDHIIISR. **29,** at 18 (Indian delegate). The negotiating process which resulted in extensive revision of Protocol II is described in Forsythe, *supra* note **114,** at **277–282,** wherein he identifies four observed poles of opinion regarding the elaboration of law on internal war: "the maximalists, the moderates, the minimalists, and the monkey-wrenchers." *Id.* at **280.**

[162] Common Article **3** applies in cases "of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . ." This provision is deliberately vague, and proposals to include a list of criteria to define "armed conflict" were rejected, in the hope that the scope of application of the article would be as wide as possible. **3** Commentary, *supra* note **33,** at **35–36.** Compare the final version of Article **1,** Protocol II:

> **1.** This Protocol, which develops and supplements [common] Article **3** . . . without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of Protocol I and which take place in the territory of a High Contracting Party between its

prerogative of a humanitarian organization to offer its services to the parties to a conflict. Draft Article 39 (Co-operation in the observance of the present Protocol) provided:

> The parties to the conflict may call upon a body offering all guarantees of impartiality and efficacy, such as the International Committee of the Red Cross, to co-operate in the observance of the provisions of the present Protocol. Such a body may also offer its services to the parties to the conflict.

This provision was deleted by consensus during the 1977 session as part of the general revision of Protocol 11. The opposition to draft Article 39 centered on its alleged interference in the internal affairs of a state, since the first sentence suggested that rebels could call upon the ICRC or some other body for assistance.[163] The ICRC delegate expressed concern about this opposition, since the draft article was intended to make available an impartial third party to facilitate observance of the Protocol, and to reaffirm the right of humanitarian initiative embodied in common Article 3.[164] Indeed, draft Article 39 was an attempt to compensate for the absence of protecting power supervision in Protocol II or Article 3 conflicts.[165]

Draft Article 8 (Persons whose liberty has been restricted) provided in paragraph 5 that "the parties to the conflict shall endeavor to facilitate visits to [all persons whose liberty has been restricted] by an impartial humanitarian body such as the International Com-

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armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

The level of dissident organization and resources required for "sustained and concerted" operations and the implementation of the more specific provisions of Protocol II through control of territory may be beyond the capabilities of many insurgent groups. ***See*** Forsythe, *supra* note **114, 284–86;** Report of the U.S. Delegation to the Diplomatic Conference **7 (1975).**

[163] Conf. Doc. CDDHIIISR. **53,** at **14** (Iraq); Conf. Doc. CDDHIIISR. **59,** *passim*

[164] Conf. **Doc.** CDDHIIISR. 63 at **3–5** (ICRC).
[165] Draft Commentary, **supra** note **123,** at **170.**

mittee of the Red Cross,'' subject only to "temporary and exceptional measures." This proposal was intended as a less intrusive version of Article **126** of Convention III and Article **143** of Convention IV (concerning access to prisoners and detainees) suitable for application in a non-international context. Its language is not clearly directive: it merely urges the parties to facilitate action by a humanitarian body.[166] This provision was also scrapped in **1977** without debate, apparently because a number of delegations did not recognize its significance.[167] Articles **126** and **143,** as would draft Article 8(5), help to prevent parties from holding persons incommunicado for extended periods and encourage the maintenance of humane conditions of detention.

Part VI (Relief) of draft Protocol II consisted of Articles **33–35** which provided for relief actions by the ICRC, including establishment of information bureaux, and assistance by National Red Cross and other relief societies. Even these modest proposals were met with what one might by this time be moved to refer to as the "all-purpose sovereignty objection." Its proponents added a further refinement by pointing out that, while offers of relief need not be accepted, nevertheless the mere offer, if made without the state's consent. is an intrusion into its internal affairs.[168]

The result was that Article **18** of the final text (Relief societies and relief actions) recognizes offers of relief only if made by "relief societies located in the territory of the High Contracting Party."[169] There is no recognition either in Article **18** or elsewhere in Protocol II of the work of the ICRC or any other non-domestic agency. Protocol II therefore not only fails to *supplement* the provisions of common Article **3,** but also fails even to *reaffirm* the right of initiative of the ICRC. Many nations of the Third World, supported by the Communist states of Eastern Europe, regularly invoked the argument of sovereignty as a bar to the presence of any third party concerned with the implementation of humanitarian law in internal war.[170] They failed to heed the admonition from the Egyptian dele-

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[166] *Id.* at **140.**

[167] Forsythe, *supra* note **114,** at 282–83. Draft Article 8 became Article 5 of Protocol I, but the provision concerning ICRC visits was eliminated.

[168] Conf. Doc. CDDH/SR. 53, at 8 (Mexico).

[169] Protocol II, *supra* note 6, art. 18, para. 1.

[170] The reluctance of many nations of the Third World to support a third-party presence in internal conflicts is perhaps understandable, given that their govern-

gate that "charity should begin at home."[171] The Western delegations had hoped to compensate for the lack of enforcement mechanisms by giving Protocol II a low threshold of applicability, but did not succeed.[172]

Any attempt to evaluate the contribution of the recent Protocols to the development of the system of protecting powers and the role of the ICRC necessarily suffers from a lack of historical perspective on their application. One can only hope that the sometimes fragile consensus at the Diplomatic Conference will develop into a general willingness on the part of most nations to become parties to these new Protocols and to honor the obligations created thereunder in good faith. The Diplomatic Conference illustrated the degree to which ideological and political factors may affect the development and implementation of humanitarian measures. The measures for implementation of the law will only be as effective as the political wills of future adversaries permit them to be.

However, some provisions of Protocol I may encourage a greater congruence between political will and legal obligation. Article 5 supplements common Article 8 of the 1949 Conventions by providing procedural encouragement to the parties to agree on protecting powers, notably by permitting the intervention of an intermediary to help avoid an impasse. States engaged in future international conflicts may find it politically more awkward to evade the appointment procedures of Article 5 than they would have to ignore the system outlined by the Conventions alone.

Article 5 falls short of the prior expectations of a number of states and commentators in paragraph 4, which makes appointment of the ICRC as a substitute a consensual process. This result has been criticized not only for failing to reinforce the automaticity of com-

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ments, more than those of developed countries, are often the targets of dissident movements. Nevertheless, it was this same group of states that pushed through the provisions of Article 1, Protocol I, extending the full range of humanitarian norms to "wars of national liberation." This "selective humanitarianism" threatened "to [destroy] the Protocol on internal war altogether." Forsythe, *supra* note 114, at 280.

[171] Conf. Doc. CDDH/SR. 49, at 5.

[172] Forsythe, *supra* note 114, at 294 n. 100. *See* Conf. Doc. CDDH/212 (Canadian draft Protocol).

mon Article 10(3),[173] but also as potentially weakening that provision retroactively.[174] As remarked earlier, it often goes unmentioned that the ICRC's automatic role in Article 10(3) was not intended to be that of an official substitute. It was limited to an offer of humanitarian services made to the detaining power in the absence of any protecting power or substitute. It was after the Conventions had been adopted that the ICRC decided that it could serve as a substitute, and even then it had reservations; so new Article 5(4) need not be read to contradict common Article **10.**

For example, if the ICRC determined that the parties to a conflict were unwilling to accept its offer to serve as a substitute under Article 5(4), the Committee could still offer its services to each detaining power on an unofficial basis under common Article 10(3). This legal distinction may have little practical consequence in the field, since the ICRC's new position is that all functions of the protecting power under the Conventions are humanitarian in nature, so that the scope of its activities under Article 10(3) would be essentially the same as under new Article 5(4).[175] That is, the distinction between the role of substitutes under paragraphs **1** and **2** of Article **10 (all** functions of the protecting power under the Conventions) and the role of a humanitarian organization under Article 10(3) (all *humanitarian* functions of the protecting power under the Conventions) has disappeared, since "all humanitarian functions'' is equivalent to "all functions." So while it is true that new Article 5(4) fails to *extend* automaticity to the appointment of official substitutes, it *does reaffirm* what was previously true under paragraph **1** of common Article **10:** namely, that the appointment of a substitute or-

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[173] *E.g.*, Forsythe, *Three* ***Sessions*** *of Legislating Humanitarian Law: Forward March, Retreat, or Parade Rest?* 11 Int'l Law. **131, 134 (1977);** Conf. Doc. CDDHIIISR. 28, at **1–2** (Egypt).

[174] *Id.* at **2.** *But see id.* at *6,* where the Swiss delegate stated that Article **5** in no way affects paragraphs **2–6** of common Article 10; Conf. Doc. CDDHISR. **37,** at **3,** where the Canadian delegate stated that, to the extent Article 5 did not duplicate Convention provisions, those remained valid; and *id.* at 11, where the delegate from Belgium stated that Article 5 complements common Article 8 and does not weaken paragraphs **2** and **3** of common Article **10.**

[175] Even the ICRC's traditional role under common Article 9 and its specific tasks often includes the performance of a number of functions incumbent on protecting powers, done "on a pragmatic basis" in their absence. Draft Commentary, *supra* note **123,** at **13.** The important thing is the ICRC's presence in a conflict to aid individuals, not the label under which it is operating. *See* Forsythe, *supra* note 74, at 58–60.

ganization is by consent. The difference is that now the ICRC has been formally recognized in new Article 5(4) as an organization eligible (and willing) to act as a full-fledged substitute.[176]

Since the avowed purpose of the Protocols is to supplement rather than modify the Conventions, it seems appropriate to juxtapose the provisions of common Articles 8 and 10 with those in Article 5 of Protocol I in an attempt to create a unified procedure for the appointment of protecting powers and substitutes.

Paragraphs 1 and 2 of Article 5 are consistent with common Article 8 and supplement it by emphasizing that if a state does not already have a protecting power upon the outbreak of hostilities, it has a duty to obtain one. The process of appointment remains consensual, and the provisions of common Article 8 still apply regarding, ***inter*** *alia,* the limits of the protecting power's mission and the approval of individual delegates.

If protecting powers are not appointed under the combined provisions of common Article 8 and paragraphs 1 and 2 of new Article 5, then common Article 10 offers a three-step procedure:

1. The parties may agree to entrust the duties of the protecting power to a qualified organization; failing that,

2. each detaining power shall appoint a substitute; failing that,

3. each detaining power shall request, or shall accept the offer of the ICRC or another humanitarian organization to act in place of the protecting power.

Article 5 of Protocol I provides a two-step procedure:

1. Protecting powers may be appointed with consent through the exercise of good offices by the ICRC or others, to include any necessary exchange of lists; failing that,

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[176] The ICRC remains committed to encouraging the use of actual protecting powers rather than immediate resort to itself. Thus, the ICRC representative stated at the Conference of Government Experts that the Committee did not want to function as a temporary substitute at the outset of a conflict, since that might remove the incentive to appoint protecting powers. Doc. CEiComm. IV, *supra* note 79, at 7.

2. the parties may accept an offer which may be made by the ICRC or other organization to act as a substitute.

By combining the procedures of the Conventions with those of Protocol I, one can develop a six-step process for obtaining some level of third-party supervision:

1. Protecting powers may be appointed with mutual consent under common Article 8 and paragraphs 1 and 2 of new Article 5.

2. An impartial organization may be appointed with mutual consent to act as a substitute, under common Article 10(1).[177]

3. A protecting power may be appointed with mutual consent through the good offices of the ICRC or others (to include any necessary exchange of lists) under new Article 5(3).

4. The parties may mutually accept an offer made by the ICRC or other qualified organization, after due consultation, to act as a substitute under new Article 5(4).

5. The detaining power may unilaterally appoint a substitute (to include the ICRC) under common Article 10(2) as modified by new Article 5(4).

6. The detaining power may make an "automatic" unilateral request for, or may accept the ICRC as a humanitarian "helper" under common Article 10(3).

This sequence places consensual appointments of protecting powers and substitutes ahead of unilateral actions by either side, and still preserves the "last resort" to the ICRC as a "voluntary helper.'' It also preserves a sequential distinction between the

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[177] Common Article 10(1) contemplates the consensual designation of an organization by some or all of the high contracting parties on their own initiative, either before or after the outbreak of war. Hence it has been placed ahead of the procedure created by new Article 5(3).

It is not clear whether the ICRC would be favorably disposed toward its own selection under Article 10(1) unless the parties had reasonably exhausted their attempts to agree on a protecting power. ***See*** note 176, *supra*. If the parties did approach the ICRC, it might request that they first employ the procedure in new Article 5(3), since the ICRC views itself as a "last resort."

ICRC's offer to serve as a substitute under new Article 5(4) and its offer to serve under common Article 10(3). Admittedly, there is little, if any, distinction left between these two roles, but the ICRC has never been preoccupied with legal distinctions, being more properly concerned with providing assistance to war victims under whatever legal proviso the belligerents are willing to accept. This legal ambiguity has been a strength rather than a weakness of ICRC activities in the past. Indeed, we may add to our six-step sequence:

7. An offer of services may be made under common Article **9.**

8. Action may be based on the ICRC's specific tasks and right of intitiative as recognized in the Conventions and Protocol I, especially new Article 81(1).[178]

9. An offer of services may be made under common Article **3,** if the parties refuse to acknowledge the existence of an international conflict.

It is hard to see how any belligerent state which is willing to make a good-faith effort to apply the provisions of the Conventions and Protocol I concerning third-party supervision can fail to find an acceptable alternative within the sequence listed above. And for those states which refuse to act in good faith, no list of options would be long enough, although, as noted earlier, this supplementary procedure may be more difficult to evade without suffering some measure of international embarrassment, which in turn may encourage compliance.

Another force for compliance may be the fact that unilateral action by each detaining power may lawfully follow in the absence of agreement on protecting powers or substitutes. This reality may provide an incentive for belligerents who cannot agree on protecting

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[178] Paragraph 1, Article 81 (activities of the Red Cross and other humanitarian organizations):

> 1. The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favor of these victims, subject to the consent of the Parties to the conflict concerned.

powers to indicate their willingness to accept the ICRC under Article 5(4). Otherwise the welfare of their detained and imprisoned citizens in the territory of an adversary will depend upon that adversary and whichever third party (if any) it decides to appoint.[179] This may prove to be the real strength of Article 5. That is, it creates the possibility of an offer by the ICRC to serve as a substitute which can now be directed to *all* parties to the conflict collectively *before* the need arises for each detaining power to act unilaterally. This encourages reciprocity, which has historically been a powerful factor for compliance with public international law and with the law of war in particular.

The precise effect of new Article 5, and especially paragraph 4, on the pre-existing system of protecting powers and substitutes will no doubt remain subject to debate for some time. What should be clear from our comparison of the new provisions with the old is that they can be combined in a way which strengthens rather than weakens the system of third-party supervision and the role of the ICRC therein. It is also clear from Article 5 that questions of recognition and continued diplomatic relations can no longer be plausibly advanced as reasons for failing to invoke this system. Also, the provision for an international inquiry commission in Article 90 of Protocol I makes clear that the protecting power's role does not extend to such activities, and thereby removes another possible obstacle to its appointment and operation.

In addition to broadening the ICRC's role under the system of protecting powers and substitutes, Protocol I reaffirms the ICRC's traditional relief role in Article 81. Furthermore, while the various provisions of Protocol I do not establish an "ICRC monopoly", they do not negate the fact that in practice the ICRC will be given a measure of priority by many states which recognize the ICRC as the special guardian of the law of Geneva. One thing is clear: the ICRC will not be competing with the United Nations in the foresee-

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[179] While common Article 10(2) contemplates that the organization unilaterally appointed will be the same one identified in Article 10(1) by the contracting parties, there is no restriction on the selection of a state as the substitute, except that it be "neutral."

The contemporary difficulties with the concept of neutrality have been previously discussed. From the viewpoint of a belligerent, some states are likely to be more "neutral" than others, making acceptance of the ICRC's offer a more appealing alternative.

able future, since proposals for a United Nations role under Article 5 and elsewhere were rejected.[180]

To proponents of a stronger system of third-party supervision, the real disappointment of the Conference is Protocol 11. The delegates discarded a provision which reaffirmed the ICRC's right to offer its services in an internal conflict, and also eliminated the ICRC's provision for establishing third-party contacts with prisoners and detainees during a domestic struggle. The only relief action recognized by Protocol II is that of domestic relief agencies. Thus Protocol II completely fails to respond to the critical need for some mandatory form of third-party supervision in internal conflicts.[181] If the experience of the past three decades is indicative of the frequency of such internal struggles in the immediate future, Protocol II has left unfilled a substantial gap in the supervision of modern warfare. Furthermore, if its threshold of violence is indeed higher than that of common Article 3, the numerous substantive provisions of Protocol II which seek to supplement the humanitarian rules of internal war may rarely be invoked.[182]

VI. THE FUTURE OF THIRD-PARTY SUPERVISION

The consensus adoption of Article 5 of Protocol I by the Diplomatic Conference[183] reaffirmed the reliance of the international com-

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[180] For example, a proposal to coordinate relief actions through "international bodies such as the United Nations agencies" was rejected in Committee II. Conf. Doc. CDDH/II/433, at 30.

[181] Protocol II not only omits all reference to non-domestic initiatives, but also explicitly reinforces the sovereignty arguments which precluded them. Article 3, para. 2 provides:

> *Nothing* in this Protocol shall be invoked as a justification for intervening, directly or indirectly, *for any reason whatever*, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

(Emphasis added).

[182] This is not to suggest that there is no cause for optimism. "[T]he very existence of the Protocol, and the debates thereon, lend further legitimacy to the basic notion of humane treatment for those taking no active part in hostilities . . ." Furthermore, "certain states might well become parties to the instrument and also the locus of a Protocol II situation . . . ." Forsythe, *supra* note 114, at 295.

[183] Conf. Doc. CDDH/SR. 27, at 17.

munity on the system of protecting powers and substitutes as the principal means "to secure the supervision and implementation"[184] of the humanitarian law of Geneva. This reaffirmation followed nearly three decades characterized by neglect of the protecting power, raising the question whether renewed reliance on this system has not been misplaced.

The efforts of the delegates to strengthen the system were an acknowledgment of its existing weaknesses but apparently not a reflection of widespread doubt as to its continued importance.[185] However, the fact that the greatest part of the debate on Article 5 concerned the procedure for appointing substitutes suggests that it is in this area that the future development of the law may be most promising. The automatic acceptance of the ICRC or other substitutes was vigorously debated and found significant support, while the idea of automatic acceptance of protecting powers was dismissed even before the Diplomatic Conference convened.

This may reflect a measure of deference to international custom, but it also indicates that future reforms to encourage more frequent third-party supervision of international conflict may be more easily directed toward substitute organizations than toward protecting powers. Indeed, even with the procedural additions of Article 5(3), the process by which a protecting power is appointed has changed little from the time of the Franco-Prussian War over a century ago.

When one shifts attention from international to internal conflicts, the prospects for protecting power supervision appear even dimmer, while those for the effective presence of an impartial organization retain a glimmer of hope emanating from the right of initiative recognized in common Article 3. There is no indication that nations are prepared even to entertain the idea of third-state supervision of their internal struggles. The complete absence of any reference to non-domestic agencies in Protocol II emphasizes just how reluctant many nations are to further internationalize the supervision of these conflicts.[186] Therefore, if the frequency of internal

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[184] Protocol I, *supra* note 6, art. 5, para. 1.

[185] The post-World War II failure of common Articles 8 and 10 of the conventions was described by experts as "circumstantial, not structural." Doc. CEiComm. IV, *supra* note 79, at 1.

[186] The depth of feeling concerning internal conflicts is illustrated by the remarks of the Indian delegate to the Diplomatic Conference. He stated that "the provi-

wars in the past thirty years is indicative of the trend for the foreseeable future, the protecting power will remain foreclosed from acting in a majority of conflicts.

On the other hand, common Article **3** still stands and, in conjunction with Protocol II, precludes any signatory state from asserting that its treatment of dissident armed forces in an internal conflict is wholly a matter of domestic concern. The most productive course for the future in dealing with internal conflagrations will be found in the continuing effort to build upon the revolutionary foundation laid by common Article **3,** which internationalized, at least to a limited degree, the rules of conduct in domestic conflicts, and opened the way for a humanitarian presence to encourage their application.

International law, and the law of war in particular, has always relied to a great extent on voluntary application. But the existence of hostilities puts maximum strain on the forces for auto-implementation,[187] and universal acceptance of the law of war therefore becomes critically important. Thus, there is often a tension between the interest in reform and the interest in universality. Any proposal to strengthen the system governing appointment of substitute organizations must reckon with the reality that the provisions of Article 5(4) represent a very recent expression of the limits of political consensus in this area.

Nevertheless, it is not overly-optimistic to conclude that the idea of automaticity was not forever laid to rest by Protocol I, especially if the ICRC re-thinks its position concerning substitution and announces that it is willing to commit itself to make an offer whenever a conflict falling under Protocol I erupts, if the parties have, in advance, bound themselves by agreement automatically to accept. Of course, this arrangement directly engages the objection so persistently aired at the Diplomatic Conference concerning sovereignty. But it is not unrealistic to envision the gradual erosion of this objec-

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sions of Protocol II will only militate against the sovereignty of States and will interfere in their domestic affairs." He added that common Article **3** was intended only to cover colonial and imperial internal wars, which had now been internationalized as wars of liberation. Therefore Article **3** offered no support for the creation of Protocol II. Conf. Doc. CDDHISR. **49,** Annex, 6–7, ***cited*** in Forsythe, *supra* note 114, at 281.

[187] Draper, *supra* note 1, at **25.**

tion [188] and the implementation of automaticity, perhaps initially among some of its recent supporters, through bilateral or multilateral agreements.

However, there is an important complication to automaticity which may significantly deter both the nations and the ICRC from embracing it. By agreeing in advance to accept an offer made by the ICRC, a state may implicitly be agreeing to be bound by the ICRC's *a priori* determination that there exists an international conflict, as defined by Protocol I, so as to warrant the offer. If a state is not so bound, then automaticity loses much of its efficacy, since a state could always refuse the offer on the grounds that it was not properly made, because no international conflict existed. Given the politically-charged criteria of Article 1(4) of Protocol I concerning "colonial domination", "alien occupation", and "racist regimes", such objections by incumbent governments are likely to be frequent if the conflict involves any challenge to the legitimacy of the government. The necessity of deciding when automaticity applies could therefore be a major obstacle to its acceptance in this era of undeclared and often unconventional wars.

In the absence of the traditional declaration of war, it would not seem inappropriate to leave the decision as to when there is an international conflict to an impartial body like the ICRC. But there are factors which weigh against the ICRC's assumption of such a responsibility, not the least of which is the Committee's concern that its involvement in political disputes between belligerents might tarnish its reputation for impartiality and undermine its traditional relief role. "Half a loaf may be better than none." [189] Furthermore, there are a number of states which would prefer not to rely exclusively on the ICRC, and a few which have directly questioned its impartiality.

One way to sidestep the issue of whether a conflict is international or internal is to agree to accept the ICRC's offer to supervise the implementation of the law in both situations, thereby enabling it

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[188] The argument that being bound to accept the offer of a substitute is somehow irreconcilable with sovereignty is not compelling. The agreement to be bound, by treaty or otherwise, is itself a sovereign act and in no way diminishes the dignity or status of the signatory state.

[189] Bond, *supra* note **102,** at 190.

to make the offer without having to characterize the conflict as international. The ICRC already has the right to offer its services in both situations under common Articles **3** and 9. The next step is to make acceptance mandatory. In fact, if Articles **3** and 9 could be amended in this way, the question of official substitutes might become one of secondary importance. That is, once the ICRC gained access to the victims of a conflict it might often make little difference that it was not wearing the label of official substitute, since it can often persuade the local government to permit the expansion of humanitarian activities without any specific reference to the legal basis for such activity.

It must be admitted, however, that the organization's efforts at persuasion may not always be successful. The acceptance of the ICRC as an official substitute by the parties to the conflict would still provide the strongest legal foundation for its activities. Furthermore, the question of characterization may inevitably arise because the substantive legal provisions governing international conflicts differ from those governing internal wars. Effective supervision of the implementation of the law, whether done officially or unofficially, naturally implies a need to know what the applicable law is. So while legal ambiguity may facilitate initial access by the ICRC, its usefulness thereafter may be more limited. Nevertheless, getting one's foot in the door initially may be more important than the size of the shoe.

If the ICRC remains understandably reluctant to be thrust upon belligerents and the latter do not indicate their willingness to accept, there remains the possibility of creating a permanent international body to perform the role of substitute, as contemplated by common Article 10(1). However, this idea runs into the same problems concerning sovereignty and the characterization of the conflicts. There might also be protracted disagreements over its composition and funding, and even its continued existence (since the contracting parties could dissolve it as easily as create it). The ICRC, on the other hand, is answerable only to itself, cannot be silenced by the belligerents, and possesses a reputation for impartiality and an accumulated expertise which no newly-created body could hope to match. Finally, there has been little recent enthusiasm for the idea of a permanent body as a substitute, the proposal having been dropped at the Conference of Government Experts and never revived at the Diplomatic Conference.

It has been suggested that the need to characterize the conflict as international or internal might be avoided at the outset by giving the ICRC (or a specially-created body) the mandate to operate in both situations. The problem created by this suggestion may be more intractible than the one avoided. Specifically, there is little likelihood that most states will, in the near future, accept any proposal *requiring* third-party supervision in internal conflicts, even if such supervision is provided by the ICRC.[190]

While there may be some support among developed countries for a third-party presence in a domestic conflict, they are not the ones facing recurrent internal upheavals. Third World governments working to achieve political and economic stability are and will continue to be opposed to proposals which are perceived as lending encouragement to rebel groups. The presence of a third-party supervisor carries with it the implication that the rebellion has reached a certain threshold of organized violence, [191] which in turn indicates that the rebels have achieved a measure of success.

In summary, the formidable political barriers to the extension of obligatory third-party supervision to internal war strongly suggest that automaticity should be pursued initially at the level of international conflict, even though that requires resolution of the characterization question. To condition automaticity in state-to-state confrontations on its parallel application in internal wars would be to postpone indefinitely its acceptance in either situation. Progress in the area of international conflicts is preferable to no progress at all. In the meantime, the ICRC can still avoid the characterization problem in the context of offers of service, since that initiative is recognized in both the internal and international arenas.

At a time when automatic acceptance of the existing role of protecting powers and substitutes has been so recently rejected, it may seem premature to consider the expansion of that role to include supervision of the conduct of hostilities.[192] This suggestion was dismissed by the ICRC prior to the Diplomatic Conference.

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[190] Such opposition extends not only to "automatic" provisions for third-party scrutiny, but also to any formula permitting an insurgent to call on a third party. ***See*** text above note 163, *supra*.

[191] ***See*** note 162, *supra*.

[192] In fact, third-party supervision of the conduct of hostilities occurred in medieval times, when heralds supervised military activities on the battlefield,

Even if states were willing to permit such supervision, it is difficult to see how it could be effectively implemented. The great majority of casualties, both military and civilian, in modern combat result from aerial and artillery bombardment, not from the conduct of individual infantrymen.[193] Military security would seem to preclude the advance disclosure of tactical plans to neutral delegates in many, if not most instances, including those involving artillery and air support. Third-party scrutiny would necessarily be limited to reminding commanders of their specific obligations under the doctrines of proportionality, military necessity, and the more specific provisions of the Hague Regulations and the Protocols,[194] and to private after-the-fact criticism of operations which violated such norms. This degree of supervision, which one might call "observation and comment", is not to be dismissed as insignificant. Indeed, constant reminders might affect military plans and operations, especially if the state involved is one which seeks to comply with the rules but simply needs a reminder in the heat of battle.

However, even observation and comment on the conduct of hostilities may be extremely difficult in unconventional warfare where guerrilla and counter-guerrilla operations predominate, Both sides tend to operate through small units, often of platoon size, using long-range patrolling, raids, and extensive night operations.[195] It would take a small army of neutral supervisors to observe these activities in enough detail to provide any meaningful scrutiny, and their safety would be in constant jeopardy. Furthermore, there seems little chance for reciprocity in a guerrilla environment, since rebel forces will often be unable to comply with the Geneva law concerning the treatment of captives, and will be unwilling to comply with the rules governing the conduct of hostilities, since that would mean surrendering some of their most potent weapons, such as terror.[196]

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truces, and parleys, and, thanks to their immunity, provided channels of communication between combatants. Draper, *supra* note 1, at 8.

[193] *See, Implementing the Rules of War: Training, Command and Enforcement*, 66 Proc. Am Soc. Int'l L. 183, 195 (remarks of Mr. Komer) (1972).

[194] *E.g.*, Protocol I, *supra* note 6, art. 35-42 (Methods and Means of Warfare), art. 57 (Precautions in Attack); Protocol 11, *supra* note 6, art. 4(2)(d) (acts of terrorism).

[195] *See generally* F. Kitson, Low Intensity Operations 95-143 (1971).

[196] Article 4(2)(d) of Protocol II prohibits acts of terrorism directed against persons who are not taking part or have ceased to take part in hostilities. Protocol I,

The prospects for extending protecting power or organizational supervision to the conduct of hostilities seem remote, both politically and practically. The observation and comment role described above might be useful in conventional, state-to-state conflicts, but it is doubtful whether much enthusiasm for even this limited application presently exists among nations.[197] Furthermore, the first priority today should be to increase support for the automatic acceptance of the ICRC as a substitute, but the attempt to ***extend*** its role to supervision of the conduct of hositilities would make acceptance of automaticity more onerous for those who presently oppose it, as well as for the ICRC, which does not have unlimited resources and manpower.

Ultimately, the best assurance that the whole law of war will be honored is to be found in an educated and disciplined military, trained in the fundamentals of the law of war [198] and imbued with a moral code of honorable conduct toward both adversaries and noncombatants. Chivalry, in this modern sense, ought not to be allowed to die. If it does, then no amount of third-party oversight will be adequate to prevent the wartime excesses which occur when soldiers and their commanders abandon those ethical norms which separate the prosecution of war from barbarism.

In a sense, we have come full-circle from the days of the Greek proxenos and the Venetian Resident at Constantinople. The initiative for third-party protection of foreign interests passed from the protector to those protected, and then back again, through the offers of service of the ICRC. Concurrently, this initiative evolved from one of informality to the formal designation of a protecting power, to later return in practice to the informal activities of the ICRC in the post-World War II era. Finally, we have seen individual advocates become passive conduits of information, only to later re-emerge as advocates of a common humanitarian interest. And in the past century, when much of this evolution occurred, we

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art. 37(1)(c) prohibits the feigning of civilian, non-combatant status in order to kill, injure, or capture an adversary.

[197] F. Kalshoven, *supra* note 116, at **117.**

[198] In this regard, it might be beneficial if nations would permit ICRC delegates to question troops on their knowledge of the basic rules of war. *See* Baxter, *Forcesfor Compliance with the Law of War,* 58 Proc. Am. Soc. Int'l L. **82,** 86 **(1964).**

have witnessed the rise of the protecting power and its rapid post-War decline, coupled with the expansion of the ICRC's role to help fill the void.

For the present, we may have to continue to rely on the informal good offices of the dedicated group of Swiss citizens which represents the humanitarian values of the community of nations in times when those values are most threatened. The future of protecting power supervision will depend, to a great extent , on the willingness of belligerents to acknowledge the existence of international conflicts, and on the success of Article 5's new procedures in encouraging appointments. In the meantime, the nations and the ICRC should continue to work toward automatic appointment of substitutes in international conflicts. They should work also for creation of a stronger legal basis for third-party supervision in internal wars. The success of these efforts will rest on the willingness of nations to reconcile their sovereignty with the need for effective implementation of humanitarian law in time of war.

PUBLICATIONS RECEIVED AND BRIEFLY NOTED

I. INTRODUCTION

Various books, pamphlets, tapes, and periodicals, solicited and unsolicited, are received from time to time at the editorial offices of the *Military Law Review*. With volume *80*, the *Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. These comments are prepared by the editor after brief examination of the publications discussed. The number of items received makes formal review of the great majority of them impossible.

The comments in these notes are not intended to be interpreted as recommendations for or against the books and other writings described. These comments serve only as information for the guidance of our readers who may want to obtain and examine one or more of the publications further on their own initiative. However, description of an item in this section does not preclude simultaneous or subsequent review in the *Military Law Review*.

Notes are set forth in Section IV, below, are arranged in alphabetical order by name of the first author or editor listed in the publication, and are numbered accordingly. In Section 11, Authors or Editors of Publications Noted, and in Section III, Titles Noted, below, the number in parentheses following each entry is the number of the corresponding note in Section IV. For books having more than one principal author or editor, all authors and editors are listed in Section 11.

The opinions and conclusions expressed in the notes in Section IV are those of the editor of the *Military Law Review*. They do not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

11. AUTHORS OR EDITORS OF PUBLICATIONS NOTED

American Council for Nationalities Service, *How to Become A Citizen of the United States* (No. 1).

Bernd, Joseph L., and William C. Havard, eds., *200 Years of the Republic in Retrospect* (No. 12).

Bertolet, Mary M., and Lee S. Goldsmith, eds., *Hospital Liability: Law and Tactics* (No. 2).

Bevel, George C., ed., and Public Service Research Foundation, *Government Union Review* (No. 3).

Bond, James E., *James Clark McReynolds: I Disseiit* (No. 4).

Bonnie, Richard J., *Marijuana Use and Criminal Sanctions: Essays on the Theory arid Practice of Decriminalization* (No. 5).

Bureau of National Affairs, *Divorce Taxation: Tax Aspects of Dissolution aiid Separation* (No. 6).

Danilov, Dan P., *Immigrating to the U.S.A.* (No. 7).

Gayle, Addison, Jr., *Richard Wright: Ordeal of a Native Son* (No. 8).

Gerhart, Frederick J., *The Gift Tax* (No. 9).

Goldsmith, Lee S., and Mary M. Bertolet, eds., *Hospital Liability: Law and Tactics* (No. 2).

Goldstein, Richard S., ed., and International Common Law Exchange Society, *Transnational Immigration Law Reporter* (No. 10).

Havard, William C., and Joseph L. Bernd, eds., *200 Years of the Republic in Retrospect* (No. 12).

Imwinkelried, Edward J., *Evidentiary Foundations* (No. 13).

International Common Law Exchange Society, and Richard S. Goldstein, ed., *Transnational Immigration Law Reporter* No. 10).

Kinevan, Marcos E., Persoiial Estate Planning (No. **14).**

Lyko, James J., and Dennis M. Sweeney, *Practice Manual for Social Security Claims* (No. **23).**

Marchand, Donald **A.,** *Politics of Privacy, Computers, arid Criminal Justice Records: Controlling the Social Costs of Technological Chaiige* (No. **15).**

Mewshaw, Michael, *Life for Death* (No. **16).**

Modjeska, Lee, *Handling Employment Discrimination Cases* (No. 17).

Public Service Research Foundation, and George C. Bevel, *Government Union Review* (No. **3).**

Sinclair, Kent, Jr., *Federal Civil Pracfice* (No. **18).**

Sprout, Harold, and Margaret Sprout, *The Rise of American Naval Power 1776–1918* (No. **19).**

Sprout, Margaret, and Harold Sprout, *The Rise of American Naval Power 1776–1918* (No. **19).**

Stockholm International Peace Research Institute, *Internationalization to Prevent the Spread of Nuclear Weapons* (No. 20).

Stockholm International Peace Research Institute, *The NPT: The Main Political Barrier to Nuclear Weapoii Proliferation* (No. **21).**

Stone, Christopher D., *Should Trees Have Standing? Toward Legal Rights for Natural Objects* (No. **22).**

Sweeney, Dennis M., and James J. Lyko, *Pracfice Manual ,for Social Security Claims* (No. **23).**

Valle, James E., *Rocks & Shoals: Order and Discipline in the Old Navy 1800–1861* (No. **24).**

III. TITLES NOTED

200 Years of the Republic in Retrospect, *edited* by *William C. Havard and Joseph L. Bernd* (No. 12).

Divorce Taxation: Tax Aspects of Dissolution and Separation, by *Bureau of National Affairs* (No. 6).

Evidentiary Foundations, by *Edward J. Imwinkelried* (No. 13).

Federal Civil Practice, by *Kent Sinclair, Jr.* (No. 18).

Gift Tax, by *Frederick J. Gerhart* (No. 9).

Government Union Review, *edited* by *George C. Bevel and the* Public *Service Research Foundation* (No. 3).

Handling Employment Discrimination Cases, by *Lee Modjeska* (No. 17).

Hospital Liability: Law and Tactics, by Mary *M. Bertolet and Lee S. Goldsmith* (No. 2).

How to Become a Citizen of the United States, *by American Council for Nationalities Service* (No. 1).

Immigrating to the U.S.A., by *Dan* P. *Danilov* (No. 7).

Internationalization to Prevent the Spread of Nuclear Weapons, by *Stockholm International Peace Research Institute* (No. 20).

James Clark McReynolds: I Dissent, by *James E. Bond* (No. 4).

Life for Death, *by Michael Mewshaw* (No. 16).

Marijuana Use and Criminal Sanctions: Essays on the Theory and Practice of Decriminalization, by *Richard J. Bonnie* (No. 5).

Moral Foundations of the American Republic, *edited* by *Robert H. Horwitz* (No. 11).

NPT: The Main Political Barrier to Nuclear Weapon Proliferation, by *Stockholm International Peace Research Institute* (No. 21).

Personal Estate Planning, *by Marcos E. Kinevan* (No. 14).

Politics of Privacy, Computers, and Criminal Justice Records: Controlling the Social Costs of Technological Change, *by Donald A. Marchand* (No. 15).

Practice Manual for Social Security Claims, *by Dennis M. Sweeney and James J. Lyko* (No. 23).

Richard Wright: Ordeal of a Native Son, *by Addison Gayle, Jr.* (No. 8).

Rise of American Naval Power 1776–1918, *by Harold Sprout and Margaret Sprout* (No. 19).

Rocks & Shoals: Order and Discipline in the Old Navy 1800–1861, *by James E. Valle* (No. 24).

Should Trees Have Standing? Toward Legal Rights for Natural Objects, *by Christopher D. Stone* (No. 22).

Transnational Immigration Law Reporter, *edited by Richard S. Goldstein and International Common Law Exchange Society* (No. 10).

Two Hundred Years of the Republic in Retrospect, *edited by William C. Havard and Joseph L. Bernd* (No. 12).

IV. PUBLICATION NOTES

1. American Council for Nationalities Service, *How to Become a Citizen of the United States* (22d ed.). New York, N.Y.: Arno Press, Inc., a New York Times Company, 1980. Pages: 147. Paperback. Index. Publisher's address: American Council for Nationalities Service, 20 West 40th Street, New York, N.Y. 10018.

Under current United States law, a worldwide total of 290,000 persons are permitted to become immigrants each year, with a limit of 20,000 per year from any one country. This practical, how-to-do-it book is addressed to all these people. Although written in layman's

language, the book could also be useful to attorneys who advise immigrants and aliens. First published in **1922,** this is the twenty-second edition of *How to Become a Citizen of* ***the*** *United States.*

The book is organized in two parts and eighteen chapters, supplemented by an appendix in four parts. Part I is "Naturalization Requirements and Procedures in General,'' comprised of the first eight chapters. In this part are discussed the application to file a petition for naturalization, the preliminary examination, the final hearing and formal admission to citizenship, the now partly obsolete declaration of intention, alien registration, naturalization forms and fees, and other topics.

The second part, "Naturalization and Citizenship Provisions for Special Groups,'' consists of the remaining ten chapters. The law recognizes eight preferred categories of immigrants, mostly non-citizen spouses and close relatives of citizens, and persons with scarce occupational skills. In addition, there are a number of special provisions or requirements for certain classes of people. In Part II some of the preferences are discussed, as well as requirements for immigrant status and citizenship which must be met by alien seamen, alien enemies, and others. Changes in United States law affecting former citizens and loss or revocation of citizenship are discussed.

The appendix opens with a list of office addresses for the Immigration and Naturalization Service (I.N.S.). This is followed by sample questions on the history and government of the United States, for use in preparing for the naturalization examination. The texts of the United States Constitution and the Declaration of Independence are also set forth.

For the convenience of users, the book offers a table of contents, explanatory introduction, and subject-matter index. The text is organized in numbered sections, consecutively from the beginning to the end of the book. There is no use of footnotes, tables, or charts.

The authorship of the book is institutional. Read Lewis, identified as chairman of the National Committee of the American Council for Nationalities Service, claims responsibility for the early editions of the book. Marian Schibsby and Edith Lowenstein have done more of the work on later editions. Assistance was also obtained from An-

drew J. Carmichael, Jr., Assistant Commissioner for Naturalization at the I.N.S.

Founded in 1918, the American Council for Nationalities Service describes itself as "a national, nonprofit organization, supported by voluntary contributions." Its purposes are to assist immigrants and refugees in adjusting to American life, to increase understanding among different ethnic groups, and to promote the principles of cultural pluralism. The organization has member agencies, mostly called "International Institute,'' in twenty-seven major citities, to provide information and assistance on naturalization, citizenship, and related questions.

2. Bertolet, Mary M., and Lee S. Goldsmith, editors, *Hospital Liability: Law and Tactics* (4th edition). New York City: Practicing Law Institute, 1980. Pages: xiii, 789. Price: $45.00. Publisher's address: Practicing Law Institute, 810 Seventh Avenue, New York, N.Y. 10019.

In the face of the flood of malpractice and medical tort suits which has inundated many American courts in recent decades, it is easy to forget that, as recently as twenty-five years ago, hospitals were usually protected against suit under the now largely obsolete theory of charitable immunity. This book, a complete revision of a third edition published by the Institute in 1974, reviews the current law of tort liability of hospitals from the point of view of the trial attorney working for the plaintiff or the defendant in such a case.

The book is organized in nine chapters. The first two discuss the preparation of plaintiff's and defendant's cases, and are supplemented by sample interrogatories and a plaintiff's trail memorandum. Chapter **3,** The Hospital Record, provides discussion and examples of many types of written records commonly used by hospitals. The editors of the book emphasize the vital importance of hospital records to a hospital liability case, and, more, the importance of correctly interpreting such records. **A** list of medical abbreviations follows the chapter. The fourth chapter reproduces the medical regulations found in Title 42, Code of Federal Regulations.

Chapter 5, Patient Safety, is organized in four parts. These parts discuss hospital programs for patient safety, medical staff bylaws,

hospital organization, and hospital quality assurance committee records. The sixth chapter discusses the voluntary standards issued by the Joint Commission on Accreditation of Hospitals. These standards are set forth in the J.C.A.H. Accreditation Manual for Hospitals, and are reprinted following Chapter 6, filling almost two hundred pages.

Chapter 7, The Law, reviews case law and statutes affecting hospital liability. Applicability of the tort law doctrine of respondeat superior between hospitals and physicians is reviewed. Other major topics covered are emergency room problems, and liability of hospitals based on negligence of the physician's assistant and the nurse practitioner. The eighth chapter, on informed consent, discusses at length the New York statute on this subject, and a range of related problems affecting patients' rights. Chapter 9 discusses blood transfusions, with emphasis on case law concerning liability for serum hepatitis. There follows an appendix setting forth portions of the J.C.A.H. Accreditation Manual for Hospitals not presented after the sixth chapter.

For the convenience of users, the book offers a preface, detailed table of contents, table of cases cited, and subject-matter index. As mentioned above, there are many appendices and illustrations setting forth sample forms, legal documents, and regulations. Perhaps half the book consists of such reproduced material. Footnotes are freely used, especially in the later chapters. They appear at the bottoms of the pages to which they pertain, and are numbered consecutively within each chapter.

This book was originally published in 1968 under the title Hospital Liability Law. Two revisions followed, in 1972 and 1974, bearing the title *Modern Hospital Liability—Law and Tactics*. The 1980 edition here noted has expanded and extensively revised previous material.

Both editors are attorneys, with experience in malpractice litigation. Mary M. Bertolet is associate director of quality assurance and compliance at Mt. Sinai Hospital, New York City, and is an assistant professor at the Mt. Sinai School of Medicine. Lee S. Goldsmith holds an M.D. as well as a law degree, and is an adjunct professor teaching in the malpractice field. He has lectured and published many articles on this subject.

3. Bevel, George C., editor, and Public Service Research Foundation, *Government Union Review.* Vienna, Virginia: Public Service Research Foundation, 1980. Periodical, published four times a year. Price: $10.00 per year, or $2.50 for single copy. Subscription address: Editor, The Government Union Review, **8330** Old Courthouse Road, Suite 600, Vienna, Virginia **22180.**

Promotional literature accompanying this quarterly journal explains that it has been inaugurated "to encourage scholarship in the field of public sector employer-employee relations with an eye toward the role and impact of unionism and collective bargaining on that relationship." It is not a law review, although two of the three leading articles in the first issue were written by lawyers. Rather, authors from all relevant academic and professional disciplines are published, or will be in future issues.

The articles in the first issue (winter, 1980) indicate that this new journal is somewhat conservative. The first article, by Robert Summers, a law professor at Cornell University, is entitled, "Public Sector Collective Bargaining Substantially Diminishes Democracy.'' The argument is that public sector unions tend to take away some of the authority of public officials at the management level. This in turn reduces the authority of the voting citizenry who elected the managing officials. In other words, unions and their officials, who are not elected by the public, tend to take over functions which the public has a right to expect will be performed by elected officials and their appointees.

The second article, "Extension of the National Labor Relations Act to Public Sector Employment: Radical Change or Capstone to Revolution?" was written by Edwin Vieira, Jr., a former law professor now in private practice. His point is that extension of the NLRA would favor public-sector unions and their members but would harm almost everyone else.

The next article, by William D. Torrence, a professor of management at the University of Nebraska, sets forth extensive statistics on public employee work stoppages in the United States from 1968 through **1977.** The evidence indicates that wages are the primary issue in most strikes. Professor Torrence concludes that public collective bargaining structures should be changed to allow third-party participation or at least monitoring, so that the general public will

be able to determine the legitimacy of union wage demands in comparison with other elements of public budgets.

The journal closes with a collection of short writings under the heading, "Sunshine Bargaining." That is the term used to describe negotiation of labor contracts in sessions open to the public and the news media. The writings presented were originally the remarks of various speakers at a panel discussion sponsored by the Public Service Research Foundation, on 10 October 1979, in Washington, D.C.

The Public Service Research Foundation describes itself as "an independent, non-profit, public foundation whose purpose is to increase research, scholarship, and public awareness in the area of public policy regarding public sector employer-employee relations, with emphasis on the influence by public sector unions on the nation's federal, state and local governments."

4. Bond, James E., *James Clark McReynolds: I Dissent.* Winston-Salem, North Carolina, 1979. Unpublished typescript in possession of author; copy in Judge Advocate General's School library. Pages: 250. Author's address: Professor James E. Bond, Wake Forest University School of Law, Box 7206 Reynolda Station, Winston-Salem, North Carolina 27109.

James C. McReynolds was an associate justice of the United States Supreme Court from 1914 to 1941, and was noted for his extremely conservative views on practically every case that came before the Court during those years, especially under President Franklin D. Roosevelt. This essay by Mr. Bond is a biography of Justice McReynolds, with emphasis on the forces that shaped his character, and on the reflection of that stern character in his work while on the Supreme Court.

Born the son of a small-town doctor in Kentucky in 1862, Justice McReynolds studied at Vanderbilt University and the University of Virginia School of Law, graduating from the latter in 1884. He was engaged in the private practice of law in Nashville, Tennessee, until he was appointed an assistant attorney general by Theodore Roosevelt in 1903, leaving that post in 1907 to become a special assistant to the Attorney General for the purpose of prosecuting the Tobacco Trust. Completing that task, he resigned in 1912. So great

was his success as a trust buster that McReynolds was appointed Attorney General by President Wilson in 1913, which post he occupied until his appointment to the Supreme Court in the following year.

Because of his vigorous and successful efforts against the business combinations known as trusts, McReynolds gained a public reputation as a political liberal, even a radical. As Mr. Bond makes clear, nothing could have been farther from the truth. McReynolds was extremely conservative, and held to his beliefs with the utmost rigidity. In fairness to him, it must be admitted that his beliefs and attitudes were only those of the nineteenth century South in which he grew to manhood. But apparently he was never able to change his views, and held to them with increasing stubbornness, regardless of the major events of modern history, such as World War One and the depression of the 1930's. He resigned from the Court in 1941 in protest against the election of Roosevelt to a third term. Justice McReynolds died in 1946, a bitter, defeated man, to the end unable to accept modern realities.

Mr. Bond provided a well-written, interesting, and sympathetic account of a person who, though unattractive in many ways, may be admired by some for his uncompromising honesty and strength of conviction.

James E. Bond, the author, is a professor of law at Wake Forest University School of Law, Winston-Salem, North Carolina, and has been a member of the faculty there since 1975. A 1967 graduate of Harvard Law School, he clerked for a federal district court judge for a year and then served on active duty as a captain in the Army Judge Advocate General's Corps from 1968 to 1972. During his active service he was an instructor in the International and Comparative Law Division at The Judge Advocate General's School, Charlottesville, Virginia, and earned his LL.M. and S.J.D. degrees from the University of Virginia at that time as well. From 1972 to 1975, Professor Bond was on the faculty of the Law School of Washington & Lee University, Lexington, Virginia. He is the author of *A Survey of the Normative Rules of Intervention,* **52** Mil. L. Rev. 51 (1971), and other published articles.

5. Bonnie, Richard J., *Marijuana Use and Criminal Sanctions: Essays on the Theory and Practice of Decriminalization.* Charlot-

tesville, Virginia: The Michie Company, 1980. Pages: ix, 264. Publisher's address: Michie/Bobbs-Merrill Law Publishing, P.O. Box 7587, Charlottesville, VA 22906.

Among the many controversial legal and political questions which have captured public attention in recent decades is the problem of how to deal with marijuana use. Legislators in Western European countries have had to confront this problem, just as have Congress and the various state legislatures in the United States. The book here noted is based upon a collection of articles and memoranda written by Professor Bonnie between 1974 and 1977, justifying and promoting decriminalization.

The term "decriminalization" refers to the process of removing marijuana use from the domain of the criminal law altogether, and controlling such use, if at all, in nonpunitive ways. In past generations, the law lumped marijuana dealers and users together and dealt with them in an equally severe manner. During the late 1960's, a reform movement commenced which led to amendment of most criminal codes to distinguish mere use from dealership, and to treat use leniently, normally reducing it from the status of a felony to that of a misdemeanor. Advocates of decriminalization, of which Professor Bonnie is one, would reduce use of marijuana still further to a nonoffense. The focus would shift entirely to controlling the supply and availability of marijuana.

The book is organized in seven chapters. A short introductory chapter is followed by "The Context for Decriminalization: Defining the Boundaries of Reform," and "The Case for Decriminalization." Next come chapters on suggested texts for statutory amendments, and the role of the United States Congress in decriminalization.

Chapter **6** is the largest in the book, comprising about one-third of its bulk. This chapter, "Europe and Decriminalization," is a comparative law study, showing how various Western European countries have changed their drug laws in recent decades. The picture which emerges is similar to that of the United States: a separation between drug selling and drug use, with a considerable reduction in, but not complete elimination of, penalties for use. Countries covered are France, Italy, Switzerland, the Netherlands, and the United Kingdom. The book closes with "Marijuana Use and Criminal Sanctions: **A** Transatlantic Debate."

For the convenience of the user, the book offers a preface and a table of contents, as well as the introductory chapter mentioned above. There is considerable use of statistical tables, particularly in the comparative law section. Footnotes are collected together at the end of each chapter. The book closes with a subject-matter index.

The author, Richard J. Bonnie, is a professor of law at the University of Virginia. He received his undergraduate education at Johns Hopkins University, and in 1969 completed his law studies at the University of Virginia School of Law.

6. Bureau of National Affairs, *Divorce Taxation: Tax Aspects of Dissolution and Separation*. Washington, D.C.: Bureau of National Affairs, Inc., 1980. Pages: vi, 330. Price: $50.00. Paperback. Publisher's address: Bureau of National Affairs, Inc., 1231 Twenty-Fifth Street, N.W., Washington, D.C. 20037.

In a time of high divorce rates, it is natural that the legal consequences and significance of divorce and separation should be the subjects of various articles and books. This collection of eight essays or compilations, and associated materials, addresses the tax aspects of marital collapse. The authors of the essays are practitioners and law professors from all over the United States. In form, the essays are collections of annotated citations arranged in outline form, rather than conventional law review articles, which doubtless promotes easy reference.

The book is organized in eight unnumbered chapters, corresponding to the first eight essays. These are followed by two long appendices which set forth statutes, regulations, court decisions, and forms, with commentary and analysis.

The collection of essays opens with "Tax Consequences of Spousal Support," "Tax Aspects of Dependency Exemptions," and "Divisions of Marital Property.'' These are followed by "Tax Planning for Property Transfers and/or Divisions," "Dividing a Closely Held Business,'' and "Estate and Gift Tax Aspects of Divorce." The essay section ends with "Treatment of Retirement Plans, Insurance, and Employment-Related Benefits in a Divorce," and "Tax Aspects and Deductibility of Attorneys' Fees in Divorce Actions."

Appendix I is forty-eight pages in length and sets forth the texts of five sections of the Internal Revenue Code (Title 26, United States Code), two I.R.S. regulations, and four revenue rulings. Two Supreme Court decisions follow, with two tax forms and two I.R.S. publications. The second appendix is a "portfolio" on divorce and separation, prepared by Professor Frank E.A. Sander of Harvard Law School, and by Harry L. Gutman, a member of the Boston firm of Hill and Barlow and an instructor at Boston College Law School. The portfolio consists of an essay labelled "Detailed Analysis," with various appendices showing sample clauses, methods of computation, and so forth. An extensive annotated bibliography and list of references is included as part of the second appendix. The portfolio was originally a publication of Tax Management, Inc., a division or subsidiary of Bureau of National Affairs.

The book offers a table of contents. Citations are included in the text, and wide margins are provided for notemaking with the eight essays. The system of pagination is somewhat unconventional, but is workable except in the second appendix, where it ceases to be a system at all. The organization of the book is acceptable, other than in Appendix II; the materials in the latter are very difficult to locate and use. Perhaps the failings of Appendix II are attributable to the fact that "Tax Management'' is normally a separate publication or service with its own scheme of organization.

As mentioned above the eight authors of the essays and the two compilers of the portfolio are all practitioners or law professors working in family law or tax law. One of the essayists is a certified public accountant, employed by Authur Young & Company; all the others are lawyers by training.

7. Danilov, Dan P., *Immigrating* fo *the* ***U.S.A.*** (2d ed.) Vancouver, British Columbia, Canada: Self-Counsel Press, Inc., a subsidiary of International Self-Counsel Press, Ltd., 1979. Pages: xx, 168. Price: $4.95, paperback. Appendices. Publisher's address: Self-Counsel Press, Inc., 1303 N. Northgate Way, Seattle, WA 98133; or Dan P. Danilov, Esq., 3108 Rainier Bank Tower, Seattle, WA 98101.

The subtitle of this book on immigration procedures is "Who is Allowed? What is required? How to do it!" That is an apt summary of the contents. The intended readership is people who want to

come to the United States from other countries, and people already here who want to help relatives or friends coming from abroad. The book provides step-by-step instructions for dealing with a variety of situations and needs that arise in an immigration context. Dozens of sample forms are shown. Tables are used to illustrate the procedural requirements pertaining to various categories of immigrants.

The book is organized in eleven chapters, supplemented by four appendices. The opening chapter explains who can immigrate to the United States. The next two chapters discuss the eight preference categories and several other special classifications of immigrants. Requirements for foreign medical graduates and nurses are set forth at some length. Chapter 4 tells how and where to apply for immigrant visas, and Chapter 5 explains labor certifications, who must have them and who is exempt from the requirement for them.

The sixth chapter discusses the "immigrant investor." In general, one can become an immigrant if one is willing to invest $40,000.00 in an American business and become a principal manager of that business. Chapter 7 discusses students and exchange visitors and the limitations to which they are subject. The eighth chapter concerns the various types of nonimmigrant visas available for temporary visits to the United States. Chapter 9 describes the admission process which one faces on arrival at a United States port of entry. Also covered in this chapter are exclusion and deportation hearings and rights of appeal to the Board of Immigration Appeals. The tenth chapter discusses change of status from temporary visitor to permanent resident in the United States. The final chapter reviews naturalization procedures, the statutory requirements for naturalization, the oath of allegiance, who can apply for a certificate of American citizenship, and other topics,

Appendix 1 is a list of the addresses of several dozen offices of the United States Immigration and Naturalization Service, in the United States and abroad. The second appendix sets forth the texts of various sections of the Immigration and Nationality Act, codified with many amendments at 8 U.S.C. 1101–1503 (1976). The sections excerpted describe the various classes of aliens who are eligible to receive visas. Appendix 3 is a list of commonly used immigration forms, with form numbers and titles. The final appendix is a list of forty-nine occupations, mostly unskilled in nature, for which labor certifications are not issued.

For the convenience of the user, the book offers a detailed table of contents, lists of the sample forms and the tables used, a map of the United States, a short preface, and an explanatory introduction. As mentioned above, many sample forms are illustrated, with examples of the proper method of filling them out.

Dan P. Danilov, the author, is an attorney practicing immigration law in Seattle, Washington. He has published many articles, notes, booklets, and other materials for the guidance of immigrants, aliens, and their legal advisors. Mr. Danilov received his undergraduate and legal education at the University of Washington, and was admitted to the Washington State bar in 1958. He himself is an immigrant, having come to the United States from China in 1947 at the age of twenty years.

Mr. Danilov is one of two editors of a weekly newsletter, *U.S. Immigration News*. This periodical, with three to five pages per issue, contains information about and critical comments concerning new court decisions and administrative rulings affecting aliens and immigrants. This newsletter is intended for use by legal advisors to aliens and immigrants, and also for organizations and agencies which deal with them. Working with Mr. Danilov on this periodical is Allen E. Kaye, an attorney in New York.

In addition, Mr. Danilov is note and comment editor for the *Transnational Immigration Law Reporter*, a publication of the International Common Law Exchange Society. Edited by Mr. Richard S. Goldstein, the *Reporter* is noted elsewhere in this section.

8. Gayle, Addison, Jr., *Richard Wright: Ordeal of a Native Son*. Garden City, New York: Anchor Press/Doubleday, 1980. Pages: xvi, 342. Price: $14.95. Publisher's address: Doubleday & Co., Inc., 501 Franklin Ave., Garden City, N.Y. 11530.

This work is a biography of the black novelist, Richard Wright (1908–1960), author of *Native Son*, *Black Boy*, *The Outsider*, and many other writings, both fiction and nonfiction. Not well known today, his books were very widely read and translated into many foreign languages between 1940 and 1960. The author of the biography here noted states that Wright was at that time the most famous black writer in the world. After 1960, with the civil rights

movement and subsequent developments in progress, Wright came to be identified with an older generation of black writers and intellectuals, not considered relevant to the concerns of the 1960's and 1970's. His work is now being rediscovered.

In addition to being black in a white country, Wright had the misfortune of being considered a communist (although he left the Communist Party in 1945) and a dangerous radical, during the Joe McCarthy era. He was under FBI and CIA surveillance for years. The strain was such that he voluntarily exiled himself from the United States, settling in Paris in 1947. His ordeal was not over; he continued to be intensively investigated and observed by the State Department until his death.

The author, Professor Gayle, has searched through many documents which became available for the first time under the Freedom of Information Act of 1966 and the Privacy Act of 1974. It is his conclusion that Wright was not actually working against the United States, although his strongly expressed views on social justice seemed radical during his lifetime. Moreover, Gayle finds no evidence that Wright was murdered by government agents in 1960, although the strain of being under government surveillance may have produced his hypertension and hastened his death as a result.

The book is organized in nineteen numbered chapters. For the convenience of readers, there are an explanatory introduction, a bibliography, and a subject-matter index. There is no table of contents. Footnotes are collected together near the end of the book, and are numbered consecutively within each chapter separately. A glossary of terms and abbreviations is provided.

The biographer, Addison Gayle, Jr., is a professor of English at Bernard Baruch College of the City University of New York. He has published many articles and several books on literary and other topics.

9. Gerhart, Frederick J., ***The Gift Tax.*** New York City: Practising Law Institute, 1980. Pages: xiii, **215.** Cost: $30.00. Publisher's address: Practising Law Institute, 810 Seventh Avenue, New York, N.Y. 10019.

This treatise discusses the federal gift tax, as amended by the Tax Reform Act of 1976 and the Revenue Act of 1978. The provi-

sions of the gift tax are set forth at 26 U.S.C. 0B 2501–2524 (1976), or at I.R.C. §§ 2501–2524. The book replaces a Practising Law Institute text published in 1974 under the same title, but so many changes have been made that the current work is substantially new and not merely a revised edition. This is not a casebook, but a practical description and analysis of the various statutory provisions, regulations, and court decisions pertaining to the federal gift tax.

The book is organized in five chapters, divided into numbered sections and subsections. The introductory chapter presents a few pages on the history, purposes, and constitutionality of the ***gift*** tax, and the advantages of making lifetime gifts. The long second chapter discusses, in dozens of subtopics, the general application of the gift tax. Major topics include the $3,000.00 annual exclusion, charitable and marital deductions, gifts by husband or wife to third persons, tax returns and administration, and valuation of gifts.

Chapter **3** examines what constitutes a taxable gift. Transfers for partial consideration, transfers incident to separation or divorce, and tenancies in real property between husband and wife are among the topics discussed. Also covered are life insurance and annuities, and corporations and shareholders, among other subjects. The fourth chapter considers when a gift is complete. The requirement of delivery, transfers under enforceable agreements, and property not susceptible of valuation are reviewed. Also covered are revocable transfers and several other topics. The book concludes with a short chapter on powers of appointment.

For the convenience of readers, the book offers a preface, a detailed table of contents, tables of authorities cited, and a subject-matter index. As noted above, the text is divided into numbered sections. Footnotes appear at the bottoms of the pages to which they pertain, and are numbered consecutively within each chapter separately.

The author, Frederick **J.** Gerhart, is a practicing attorney and has been associated with the Philadelphia law firm of Dechert, Price and Rhoads since 1977. **A** 1971 graduate of Harvard Law School, he served for two years as a law clerk to one of the judges on the United States Tax Court, Washington, D.C.

The original version of *The Gift Tax* was written by George Craven, also of the Dechert firm, and was published by the Institute in **1946.** Mr. Craven also prepared the next six revisions, the last of which appeared in **1966.** After Mr. Craven's death in **1972,** David E. Seymour, also of the Dechert firm, prepared the **1974** edition. When Mr. Seymour died in **1978,** Mr. Gerhart undertook the work of preparing the largely new and greatly expanded **1980** edition.

10. Goldstein, Richard S., editor-in-chief, and International Common Law Exchange Society, *Transnational Immigration Law Reporter.* Palo Alto, California: International Common Law Exchange Society, **1979.** Monthly periodical. Pages: From **20** to **40** for most issues. Price: **$125.00** for twelve monthly issues; **$15.00** for single back issue. Publisher address: I.C.L.E.S., **5** Palo Alto Square, Suite **283,** P.O. Box **51,** Palo Alto, California **94304.**

This monthly periodical, which began publication in May **1979,** presents articles and short notes describing new developments in the law concerning immigration and nationality worldwide. Emphasis is placed on the law of the United States, and considerable material concerning the United Kingdom is presented; but developments in countries in every part of the world are mentioned at least briefly. The publication is aimed primarily at American attorneys whose practice includes work on immigration and citizenship problems.

This publication is organized in six parts, or features, which recur in most issues. The opening feature is an editorial by Richard S. Goldstein, the editor-in-chief. This is usually followed by "Pages from a Practitioner's Notebook,'' presenting one or two articles of a practical, how-to-do-it nature. Examples include "How to Obtain a Second American Passport," in the June **1979** issue, and "A Typical U.S. Deportation Hearing," in the January **1980** issue. More general and theoretical are the two or three short articles presented in the third section, "Discourse and Dissertation." Examples of these articles include "British Immigration Laws, A Paper Tiger?" in the May **1979** issue; "Foreign Investment in the U.S.: A Route to Immigration," June, **1979;** and "The Movement of Persons in the European Economic Community," January, **1980.**

The fourth section, which recurs with less frequency from issue to issue than do the others, is "Transnational Clearing House on Immigrational and Nationality Laws." This section is used for directories, source lists for legal research, and other materials not readily available. The fifth section, "Immigration and Nationality News and World Report,'' is the most diverse section in the range of subject matter covered therein. It consists of reprinted news reports from newspapers, mostly American but some foreign, on developments affecting immigration, emigration, and citizenship in every country in the world. These reports, one column or less in length, are arranged alphabetically by name of country concerned. The sixth and last regularly recurring feature is "International Docket—Transnational Continuing Legal Education Programs," describing upcoming training programs in the United States and abroad.

The first issue, May, 1979, was designated volume 1, number 1. Twelve monthly numbers comprise a volume. "Supplements" on important new developments are sometimes issued. For example, the Supplement for April 30, 1980, sets forth new regulations of the U.S. Immigration and Naturalization Service on "preference petitions," which are applications by aliens for favorable consideration for immigration regardless of numerical quotas on the grounds that they have close relatives in the United States, or possess skills in short supply in the United States, or other similar qualifications. The May 28 Supplement reproduces a Presidential executive order which assigns to various federal officials tasks arising under the Immigration and Nationality Act.

The editor-in-chief, Richard S. Goldstein, is an attorney practicing immigration law in New York and London. Serving as executive editor is Dan P. Danilov, an attorney in Seattle, Washington. The managing editor is Ira B. Marshall, an attorney who serves as president and board chairperson of the International Common Law Exchange Society, and as editor-in-chief of the Society's journal, *The Common Law Lawyer.* They are assisted by contributing editors and authors from many parts of the United States and some foreign countries.

11. Horwitz, Robert H., editor, *The Moral Foundations of the American Republic* (2d ed.). Charlottesville, Virginia: University Press of Virginia, 1979. Pages: viii, 275. Price: $15.00, cloth; $3.95,

paperback. Publisher's address: University Press of Virginia, Box **3608,** University Station, Charlottesville, VA **22903.**

This collection of eleven essays on American political and social philosophy and history was originally published in **1976** as a number in the Public Affairs Series published by the Public Affairs Forum at Kenyon College, Gambier, Ohio. The essays were originally presented at two conferences sponsored by the Kenyon Public Affairs Fbrum. The contributors are primarily political scientists from the academic community.

This book may be regarded as a companion to another book published by the University Press of Virginia and noted elsewhere in this issue. That book is *200 Years of the Republic in Retrospect,* edited by William C. Havard and Joseph L. Bernd. It also was originally published in **1976.** *Moral Foundations* focus on values in a historical context, while 200 *Years* emphasizes history, but makes reference to the values which influenced the course of that history.

After a preface by the editor, the book opens with "Of Men and Angels: A Search for Morality in the Constitution,'' by Robert A. Goldwin of the American Enterprise Institute for Public Policy Research, at Washington, D.C. This is followed by "The Compromised Republic: Public Purposelessness in America,'' by Professor Benjamin R. Barber of Rutgers University. Others in the collection include "The Democratization of Mind in the American Revolution," by Professor Gordon S. Wood of Brown University, and "Religion and the Founding Principle," by Walter Berns of the American Enterprise Institute and Georgetown University. The book closes with "Slavery and the Moral Foundations of the American Republic," by Professor Herbert J. Storing, formerly of the University of Virginia, and now deceased, and "On Removing Certain Impediments to Democracy in the United States,'' by Professor Robert **A.** Dahl of Yale University. These six essays are typical of the contents of the book.

For the convenience of users, the book offers a table of contents, and an explanatory preface for the **1976** edition, updated by a short note to indicate that Professor Dahl's essay has been added in the **1979** second edition. Footnotes are moderately numerous, and are placed at the bottoms of the pages to which they pertain. The book closes with biographical sketches of the contributors, and a subject-matter index.

The editor, Robert H. Horwitz, is a professor of political science and director of the Public Affairs Conference Center at Kenyon College. He has published many articles and monographs, as well as several books. The history of political philosophy is one of his areas of expertise, and an essay on John Locke is his contribution to the volume here noted.

12. Havard, William C., and Joseph L. Bernd, editors, *200 Years of the Republic in Retrospect.* Charlottesville, Virginia: University Press of Virginia, 1976. Pages: xi, **348.** Price: **$12.50.** Publisher's address: University Press of Virginia, Box **3608,** University Station, Charlottesville, VA **22903.**

This work of American history and political science is a collection of seventeen scholarly essays on various aspects of American government and society. Not a new book, it was originally published as a special bicentennial issue of the *Journal of Politics* in **1976.** In observance of the American bicentennial celebration, some of the essays focus on political and social conditions at the time of the Revolution, but most range freely through American history.

After an explanatory preface by one of the editors, the book opens with "Conservative Revolution and Liberal Rhetoric: The Declaration of Independence," by Professor Alan P. Grimes of Michigan State University. This followed by "'Time Hath Found Us': The Jeffersonian Revolutionary Vision," by Professor Robert J. Morgan of the University of Virginia.

Other typical essays included in this volume are "The American Contribution to a Theory of Constitutional Choice," by Professor Vincent Ostrom of Indiana University, and "The Symbolism of Literary Alienation in the Revolutionary Age," by Professor Lewis P. Simpson of Louisiana State University. Among those essays dealing with present-day conditions are "Revitalization and Decay: Looking Toward the Third Century of American Electoral Politics," by Professor Walter Dean Burnham of the Massachusetts Institute of Technology, and "The Presidency in 1976: Focal Point of Political Unity?" by Dean George E. Reedy of Marquette University. The book closes with "Women's Place in American Politics: The Historical Perspective," by Professor Emeritus Louise M. Young of American University, and "Ethnics in American Politics," by Professor Louis L. Gerson of the University of Connecticut.

The book offers a table of contents and biographical sketches of the seventeen contributors, as well as the explanatory preface mentioned above. Use of footnotes varies from essay to essay, some essays having many, and others very few. Footnotes appear at the bottoms of the pages to which they pertain, and are numbered consecutively within each essay separately.

William C. Havard and Joseph Laurence Bernd are both associated with Virginia Polytechnic Institute and State University, at Blacksburg, Virginia. As indicated by the selection above, the contributors are all from the academic community, and are historians and political scientists for the most part. As mentioned, the essays were first published as a special issue of the *Journal of Politics,* volume 38, number 3, August 1976. The *Journal* is published by the Southern Political Science Association. As of 1976, Professor Manning C. Dauer of the University of Florida was managing editor of the *Journal.* He and two former editors were contributors to the special issue.

13. Imwinkelried, Edward J., *Evidentiary Foundations.* Charlottesville, Virginia, and Indianapolis, Indiana: Michie Company and Bobbs-Merrill Company, Inc., 1980. Pages: xiii, 246. Paperback. Publishers' addresses: The Michie Company, P.O. Box 7587, Charlottesville, VA 22906; Bobbs-Merrill Co., Inc., 4300 West 62d Street, Indianapolis, IN 46206.

In this textbook, Professor Imwinkelried explains by means of sample courtroom scripts how the various doctrines of the law of evidence apply in practical courtroom situations. The emphasis is on procedures for laying foundations prior to offering evidence to the trial court for admission. The targeted readership is the law student or new attorney, and the text is intended to supplement standard casebooks and treatises on the law of evidence.

The book is organized in eleven chapters. An introductory chapter is followed by one discussing motions and objections which are related to establishment of a foundation. Thereafter are presented chapters on witness competence and credibility, authentication, relevance, and the best evidence rule. The book continues with discussion of opinion evidence, hearsay, and privileges, and concludes with a chapter on miscellaneous evidentiary doctrines.

For the convenience of readers, the book offers a summary table of contents, a detailed table of contents, and a short subject-matter index. There are no footnotes or bibliographic references, but there is brief discussion of sources in the introductory chapter.

The author, Edward J. Imwinkelried, is an associate professor at the Washington University School of Law, St. Louis, Missouri. He was briefly on active duty as a captain in the Army Judge Advocate General's Corps, and was assigned as an instructor in criminal law at The Judge Advocate General's School, Charlottesville, Virginia, from **1972** to **1974.** Professor Imwinkelried received his undergraduate and legal education at the University of San Francisco. From **1974** to **1979,** he was on the faculty of the University of San Diego. He has published a number of writings, including articles at **61** Mil. L. Rev. **145 (1973), 62** Mil. L.Rev. **225 (1973),** and **63** Mil. L. Rev. **115 (1974),** as well as a four-part article on the Federal Rules of Evidence, in the April, May, June, and July **1973** issues of *The Army Lawyer*. He is one of four authors of another text, *Criminal Evidence*, noted at 84 Mil. L. Rev. **144 (1979).**

14. Kinevan, Marcos E., *Personal Estate Planning.* Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1980. Pages: xiii, **258.** Price: **$14.95,** cloth; **$6.95,** paper. Publisher's address: Prentice-Hall, Inc., Englewood Cliffs, N.J. **07632.**

This book provides information for the intelligent layperson concerning the financial and legal aspects of accumulating, protecting, and disposing of his or her personal estate. This is not a law book, although it deals with many points of law. Its focus is on the practical consequences, especially economic, of various choices available to one who is planning his estate. Lawyers who do not regularly do estate planning work could perhaps benefit from perusing a book such as this, but it is not for the specialist. Written in a businesslike but eminently readable style, this work eliminates many of the mysteries of life insurance, social security, and other topics related to estate planning.

In recent issues a number of books of interest to estate planners have been noted. *The Estate Tax*, by James B. Lewis, is noted at 85 Mil. L. Rev. **183 (1979),** and *Estate Planning*, by Jerome A. Manning, at **89** Mil. L. Rev. **121 (1980).** Elsewhere in the present issue are noted *The Gift Tax*, by Frederick J. Gerhart, and *Practice*

Manual for Social Security Claims, by Dennis M. Sweeney and James J. Lyko. However, these books are all addressed primarily to the lawyer rather than the layman, although they should not be unintelligible to the non-lawyer. These four books are all publications of the Practicing Law Institute, New York City.

Professor Kinevan's book is organized in eleven chapters grouped in two parts, followed by eight appendices. The first part, "Estate Accumulation," opens with an introductory chapter. This is followed by chapters on indebtedness, insurance of all types, the social security system and its benefits, and the financial aspects of estate planning. Chapter **6** discusses life insurance at length. This is followed by a short chapter on investments. The first part closes with a chapter on allocation of resources between insurance and other types of assets.

Part II, "Estate Distribution," contains only three chapters; the book emphasizes economic more than legal planning. Chapter 9 deals with trusts and non-probate transfers, including gifts. This is followed by a chapter on joint ownership of property and community property. The second part closes with chapter 11 on wills. This chapter discusses probate and non-probate assets, problems of intestacy, statutory requirements for wills and limitations on disposition of property, and executorship.

Eight appendices follow. These set forth formulae and tables concerning interest income, yield, and expense; federal withholding tax rates, and income, estate, and gift tax rates; a table of present values discounted; historical consumer prices; and a sample form, "Information for my Executor.''

Several dozen statistical tables and charts, or figures, are scattered throughout the text. For the convenience of readers, the book offers a table of contents, a list of the tables and figures, and an explanatory preface. Footnotes are not used, and no bibliography is provided, but some information about sources is provided in the text. A table of contents closes the book.

The author, Marcos E. Kinevan, is on the faculty of the United States Air Force Academy in Colorado. He serves as professor and head of the department of law, and chairman of the social sciences division there.

15. Marchand, Donald A., *The Politics of Privacy, Computers, and Criminal Justice Records: Controlling the Social Costs of Technological Change*. Arlington, Virginia: Information Resources Press, 1980. Pages: xvi, 433. Price: $34.95, plus $2.40 for shipping and handling. Publisher's address: Information Resources Press, 1700 North Moore Street, Suite 700C, Arlington, Virginia 22209.

The tremendous expansion of computerized recordkeeping since the 1950's, and its effects on the individual, have been the subjects of comment by many scholars, public officials, and others. The problem of protecting individual privacy has also been well known for years; the enactment of the Privacy Act of 1974, codified at 5 U.S.C. 552(a) (1976), was an outgrowth of widespread public and legislative concern. With this interest in computerization and privacy have come scholarly studies of various associated issues and problems. The book here noted is one of the latest of these studies.

The author, Professor Marchand, has selected one area of recordkeeping, the criminal justice area, for particular attention. He is interested in measuring the "social costs" of criminal justice records, i.e., the problems of damage to reputation, loss of employment, and other problems caused by misidentification of individuals in records, or maintenance of incorrect unfavorable information; difficulties posed for reform and rehabilitation efforts; and so forth. Professor Marchand applies the methods of political science to the selected problem area. He concludes that the existing public policy process does not lead to adequate recognition of or accordance of weight to the social costs of criminal justice recordkeeping. He recommends establishment of a national system of regulation of access to and use of criminal justice records, with broad participation of many interested authorities and groups in the policymaking process governing such access and use.

The book is organized in three parts and eleven chapters, supplemented by three appendices. Part I, with three chapters, defines the problem and explains how the study has approached it. The second part, the heart of the book, with seven chapters, sets forth the data of the study. These chapters describe at length the various aspects of the problem of social costs of maintaining criminal justice records, and the various legislative and executive branch efforts to deal with them. The author provides lists of proposed regulatory arrangements considered acceptable or unacceptable,

and he comments on them. Part 111, with one chapter, describes his conclusions.

In Appendix A, the author sets forth the text of proposed legislation which has his approval. This legislation is S. 2008, the Criminal Justice Information Control and Protection of Privacy Act of 1975, 94th Cong., 1st Sess., also called the Ervin bill in the text. The second appendix sets forth the text of various regulations, with official commentary and amendments, from title 28 of the Code of Federal Regulations, governing criminal justice information systems. Appendix C compares the results of two surveys performed in 1974 and 1977, showing that in the latter year many more states had taken various specified steps to regulate access to and use of criminal justice records.

For the convenience of users of the book, it opens with a foreword, a preface, a list of acronyms and abbreviations, and a table of contents. Footnotes appear at the bottoms of the pages to which they pertain and are numbered consecutively within each chapter separately. A bibliography precedes the appendices. The book closes with a subject-matter index.

The author, Donald **A.** Marchand, is an assistant professor in government and international studies at the University of South Carolina. He is also associate director of the Bureau of Governmental Research and Service at that school. In recent years he has served as consultant or otherwise to various federal and state agencies and projects concerned with regulation and organization of computerized recordkeeping. Author of numerous reports and articles on policy issues affecting information technology, he earned his doctorate at the University of California at Los Angeles.

16. Mewshaw, Michael, *Life for Death.* Garden City, New York: Doubleday & Company, Inc., 1980. Pages: 281. Price: $10.00. Publisher's address: Doubleday & Company, Inc., 501 Franklin Ave., Garden City, N.Y. 11530.

This book by a successful novelist tells the story of an actual murder, the circumstances in which it was committed, and the consequences for the murderer. In January of 1961, fifteen-year-old Wayne Dresbach shot and killed his adoptive parents at their home

in Maryland. This event was preceeded by years of verbal and physical abuse imposed on the boy by his parents. Despite the existence of circumstances that many would consider extenuating, he was sentenced to life imprisonment. Ten years later he was released on parole.

Despite its dramatic nature, such a crime is not unusual. If Mewshaw had wanted to, he could have written a crime novel with a similar plot, and avoided the intensive research necessary to construct this factual account. But this crime was different for Mewshaw because when he was in his teens, his family had a summer home not far from the Dresbachs' house and knew the family well. Mewshaw came to know Wayne Dresbach intimately as a result of visits to him in prison. There is no doubt that Dresbach did kill his parents. However, knowing what he does about the misery in which Dresbach had lived before the killing, Mewshaw came to consider the sentence of life imprisonment unreasonable. Mewshaw hopes to help Dresbach and perhaps others similarly situated, by telling the entire story.

The book is organized chronologically. The first section is labelled, "January 7, 1561," the date of the murder. Next comes "Autumn 1578," in which Mewshaw describes the process by which he came to write this book. Most of the rest of the book discusses events and developments of the year before and the year after the murder. The book closes with chapters bringing the story up to date. There are no table of contents, index, or other reader aids.

Michael Mewshaw has been a teacher at the University of Texas since 1973. In 1968 he held a Fulbright Fellowship in Creative Writing, and received an award from the National Endowment for the Arts in 1974. His published novels are *Man in Motion*, *Walking Slow*, ***The*** *Toll*, *Earthly Bread*, and *Land Without Shadow*.

17. Modjeska, Lee, *Handling Employment Discrimination Cases*. Rochester, New York: The Lawyers Cooperative Publishing Co., 1580. Pages: xvi, 555. Price: $47.50. Index, statutory appendix, table of cases. Publisher's address: Lawyers Cooperative Publishing Company, Post Office Box 23505, Rochester, New York 14603.

This large book is a treatise on the various federal statutes and court decisions thereunder dealing with employment discrimination

based on race, sex, age, and the several other classifications recognized in modern times to be arbitrary and unreasonable. This is not a casebook, but a practical, how-to-do-it manual which describes the development of the modern law of employment discrimination and presents sample pleadings for use initiating or defending a discrimination suit.

The nine chapters deal with the various statutes which prohibit discrimination, and other related topics. Chapters 1 and 2 discuss Title VII of the Civil Rights Act of 1964. The next five chapters cover other statutes including the post-Civil War, Reconstruction era legislation, and also statutes such as the National Labor Relations Act which are usually not thought of in a discrimination context. Chapter 8 discusses the special anti-discrimination requirements of federal government contracts, and the ninth chapter offers a selection of hypothetical pleadings for use by both parties in various types of discrimination suits.

The book opens with an explanatory preface, an annotated list of research references, and a detailed table of contents. Relevant portions of the table of contents are duplicated at the beginning of each chapter. The text is organized in numbered sections. Footnotes appear at the bottoms of the pages to which they pertain, and are numbered consecutively within each chapter separately.

An important part of the book is the fifteen-part appendix, which comprises about one-third of the book's bulk. This sets forth the texts of the various statutes discussed in the earlier chapters, as well as the various implementing regulations and guidelines. The book closes with a table of cases and a subject-matter index. The book has a slot for a pocket part.

The author, Lee Modjeska, is a professor of Law at Ohio State University College of Law. He is a former practitioner of labor and employment discrimination law, and was at one time an assistant general counsel of the National Labor Relations Board. He is a registered labor arbitrator.

18. Sinclair, Kent, Jr., *Federal Civil Practice.* New York City: Practising Law Institute, 1980. Pages: xl, 1119. Price: $60.00. Publisher's address: Practising Law Institute, 810 Seventh Avenue, New York, N.Y. 10019. Index, six appendices, three tables of authorities cited.

This large book by a United States magistrate describes every aspect of the operation of the federal court system. Emphasis is on practice under the Federal Rules of Civil Procedure, Title 28 Appendix, United States Code (1976), but many related topics are touched upon. The book is aimed at the attorney or law student who practices or expects to practice before federal courts, especially the United States district courts.

The book is organized in three parts and nineteen chapters. Part One, Courts and Procedure, consists of eight chapters which provide an overview of the federal judicial system and its functioning. Covered are topics such as jurisdiction, venue, pleading, and joinder. Also discussed are provisional remedies, pretrial procedure, and motion practice. This is followed by Part Two, comprised of seven chapters devoted to the increasingly important subject of discovery. Discussed are depositions, interrogatories, physical and mental examinations, and requests for production, inspection, and admission of evidence.

The book closes with a third part, with five chapters on trial and appeal. Among other topics considered are special proceedings, judgments, and post-trial proceedings in addition to appeal. Part Three is followed by six appendices. Appendix A is a list of the cities where the various United States district courts and courts of appeal set. The next appendix outlines the Federal Rules of Civil Procedure, and Appendix C does the same for the Federal Rules of Evidence. The fourth appendix outlines the Federal Rules of Appellate Procedure; the fifth, the rules of the Supreme Court; and the last, the fee schedule published by the Administrative Office of the United States Courts.

For the convenience of users, the book offers a table of chapters, followed by a detailed table of contents. Each chapter opens with its own table of contents. Copious footnotes are provided. These appear at the bottoms of the pages to which they pertain, and are numbered consecutively within each chapter separately. The book closes with tables of cases, rules, and constitutional and statutory references cited, and a subject-matter index. A Federal Rules locater is printed inside both the front and back covers.

The author, Kent Sinclair, Jr., has served as a magistrate with the United States District Court for the Southern District of New

York since 1976. He has also taught courses in procedure as an adjunct professor at Fordham University since 1973, and was formerly in private practice with Shearman & Sterling of New York City.

19. Sprout, Harold, and Margaret Sprout, *The Rise of American Naval* ***Power*** *1776–1918* **(2d** ed.). Annapolis, Maryland: Naval Institute Press, 1980. Pages: xii, 404. Price: $14.95. Publisher's address: Marketing Department, U.S. Naval Institute, Annapolis, MD 21402.

This work is **a** revision and reprinting of one of the classics of American naval history, first published in 1939. The authors trace the development of American naval policy, with its many changes of direction, from the Revolution through the War of 1812, the Civil War, the Spanish American War, and the First World War. This revised edition was first published by the Princeton University Press in 1966. The book continues to be held in such high esteem by scholars interested in the American Navy, that this 1980 reprinting was considered justified by the U.S. Naval Institute.

The authors have stated in their 1966 introduction that **a** new edition was considered necessary because the experience of World War Two made necessary a reevaluation of their previous views concerning the U.S. Navy's history. In particular, they state, they were too much influenced by the views of Alfred Thayer Mahan (1840–1914) in certain respects.

Mahan was a naval officer who rose to the rank of rear admiral and served as president of the Naval War College in the late nineteenth century. He was a talented and prolific naval historian and theorist whose influence on American naval policy was so great that he came to be regarded as the father of the U.S. Navy as it developed in the twentieth century. In particular, he foresaw that the United States would become a world power, and that a strong navy would be essential in furthering this development. Mahan's views were first implemented under President Theodore Roosevelt.

Though Mahan's commanding position in American naval history during the past century is probably unassailable in most respects, he did have a few blind spots. He did not foresee, for example, the

importance that aircraft, submarines, and land-based motor vehicles would have in future warfare, although these things were being developed during the last decades of his life. Some of Mahan's ideas about tactics are questionable. Also, he overestimated the importance of the Panama Canal as one of the world's waterways. These points are mentioned by the Sprouts in their revised edition, not to denigrate Mahan, who remains one of the most perceptive of American military men, but to establish a more balanced picture of the man and his achievements.

The book is organized in twenty chapters, arranged in chronological order of the events and developments related. (The importance of Mahan is perhaps suggested by the fact that no less than four of the chapters describe his policies and their early implementation.)

For the convenience of readers, the book offers an introduction and a short table of contents. Footnotes are used freely throughout, and are numbered consecutively within each chapter and appear at the bottoms of the pages to which they pertain. A bibliographical essay appears after the last chapter. The book closes with a subject-matter index.

The Sprouts have published many books and articles on history, government, and environmental policies. They were formerly affiliated with Princeton University, where Harold Sprout rose to the level of professor before his retirement.

20. Stockholm International Peace Research Institute, *Internationalization to Prevent the Spread of Nuclear Weapons*. London, United Kingdom: Taylor & Francis, Ltd., 1980. Pages: xxv, 224. Price: $24.50. Distributed in United States by Crane, Russak & Co., Inc., 3 East 44th St., New York, N.Y. 10017.

Decade by decade, more and more countries around the world are acquiring nuclear power plants or are otherwise using nuclear energy for peaceful purposes. Though many such users of nuclear energy do not possess nuclear weapons, all of them could produce such weapons from materials they have at hand through their peaceful production of nuclear energy. There exists no technical means for preventing such production. This is based upon the recently issued report of the International Nuclear Fuel Cycle Evalu-

ation, a high-level study group whose work was initiated in October 1977 under United States encouragement.

The institutional author and editor of this book, SIPRI, views this state of affairs with alarm, and is proposing that certain parts of the nuclear fuel cycle be placed under international control, perhaps through an expanded International Atomic Energy Agency. The essays collected in this work discuss various problems of international control, and mechanisms for dealing with them. The book has been published as background material for the second conference for review of the Nuclear Non-Proliferation Treaty, to take place in Geneva during August and September of 1980.

The book is organized in two parts. Part I, "Internationalization to prevent the spread of nuclear weapons," sets forth the views of the SIPRI staff on nuclear weapons proliferation and its dangers, and the possibility and practicability of internationalization as a means of controlling or reducing these dangers.

Part II is a collection of twenty-one papers by scholars from several countries. These papers were originally presented at a symposium on internationalization of the nuclear fuel cycle, held in October and November of 1979 under SIPRI sponsorship. The papers cover many technical aspects of the general problem addressed. Examples include "Background Data Relating to the Management of Nuclear Fuel Cycle Materials and Plants," "An International Plutonium Policy," and "A New International Consensus in the Field of Nuclear Energy for Peaceful Purposes." Others deal with "Export of Nuclear Materials," "An International Fuel Bank," and "Institutional Solutions to the Proliferation Risks of Plutonium." The book closes with "Multinational Arrangements for Enrichment and Reprocessing," "Sanctions as an Aspect of International Nuclear Fuel Cycles," and "Internationalizing the Fuel Cycle: The Potential Role of International Organizations."

For the convenience of readers, the book offers a preface, a detailed table of contents, a table of energy units, a glossary of technical terms used, and abstracts of the twenty-one papers of Part II. All these features appear at the beginning of the book. Lists of references appear at the end of each essay. The book closes with a subject-matter index.

In addition to the authors of the essays in Part 11, this book was edited by a team of SIPRI scholars, led by Dr. Frank Barnaby, the director of SIPRI. Financed by appropriations of the Swedish Parliament, SIPRI describes itself as "an independent institute for research into problems of peace and conflict, especially those of disarmament and arms regulation." Nuclear weapons are of particular concern to SIPRI, although all types of weapons of war have been the subjects of SIPRI attention. The organization was founded in 1966 to commemorate the 150th anniversary of Sweden's peace. The SIPRI staff and its governing board and scientific council are international in membership.

21. Stockholm International Peace Research Institute, *The NPT: The Main Political Barrier to Nuclear Weapoii Proliferation.* London, United Kingdom: Taylor & Francis, Ltd., 1980. Pages: viii, 66. Price: $8.95, paperback. Distributed in United States by Crane, Russak & Co., Inc., 3 East 44th St., New York, N.Y. 10017.

The Treaty on the Non-Proliferation of Nuclear Weapons was signed in 1968 and entered into force in 1970. The states parties, now numbering 113, held a review conference in 1975 to evaluate performance of obligations under the treaty and to consider whether any changes of interpretation or emphasis are needed. The review conference reported that some progress in controlling nuclear weapons had been made, but that, overall, the arms race has continued worldwide at a dismaying pace. The states parties represent a cross section of all the world's states, but a number of important countries are not yet parties, including Brazil, France, India, and the People's Republic of China.

The second NPT review conference is due to take place in Geneva, Switzerland, during August and September, 1980. The small book here noted has been prepared for use in connection with this conference. It reviews the issues facing the conference, criticizes the implementation of the treaty during the past few years, and suggests improvements in that implementation. The book is a companion to a larger SIPRI publication, *Internationalization to Prevent the Spread of Nuclear Weapons*, which discusses possible means of limiting the availability of by-products of peaceful uses of nuclear power which can be employed in producing weapons.

The book is organized in six chapters, with three appendices. After a chapter providing a somewhat gloomy introductory overview, the first six articles of the treaty are examined, one or two at a time. These six articles are substantive in nature, setting forth obligations of the parties with regard to transfer of weapons, safeguards, peaceful nuclear cooperation, and related topics. The remaining articles of this eleven-article document concern procedural matters. Chapter 6 of the book sets forth SIPRI's conclusions and recommendations to the review conference.

For the convenience of readers, the book offers a preface, a detailed table of contents, and a subject-matter index. There is some use of footnotes, statistical tables or diagrams, and illustrations. The three appendices set forth the text of the treaty, a list of the parties thereto, and the report or "Final Declaration" of the **1975** review conference.

The book was prepared by SIPRI staff members under the leadership of Dr. Frank Barnaby, the director of SIPRI. Established in **1966** and funded by the Swedish Parliament, SIPRI describes itself as "an independent institute for research into problems of peace and conflict, especially those of disarmament and arms regulation." The membership of SIPRI's staff and governing bodies is international.

22. Stone, Christopher D., *Should Trees Have Standing? Toward Legal Rights for Natural Objects.* Los Altos, California: William Kaufmann, Inc., **1974.** Pages: xvii, **102.** Price: **$2.95.** Paperback. Publisher's address: William Kaufmann, Inc., One First Street, Los Altos, California **94022.**

This small book is not a new publication. In fact, it is a **1974** reprint of an article first published in the Southern California Law Review **(45** S. Cal. L. Rev. **450** (spring **1972)).** But in a time of continuing concern about pollution and environmental issues, this article is perhaps worth rediscovery.

The book's title means exactly what it says. The author proposes that natural, non-human objects be accorded legal rights, in like manner with corporations. The article seeks to justify this interesting and novel proposition.

The book is organized in two parts. It opens with a long foreword by Garrett Hardin, Ph.D. At the time of publication in **1974,** he was professor of human ecology at the University of California at Santa Barbara. He is author of an article entitled, "Population, Biology, and the Law," 48 J. Urban L.-U. Det. **563** (Apr. 1971). The foreword is followed by part I, which is Professor Stone's original article. Part II is a reprint of the Supreme Court's decision in Sierra Club V. Morton, **405** U.S. **727** (1972), concerning the preservation of the Mineral King Valley in California against development as a recreation area by Walt Disney Enterprises, Inc. Both the majority opinion denying standing of the Sierra Club to sue, and the minority opinions arguing for standing, are presented.

A table of contents and a subject-matter index are provided for the convenience of the reader. Both the Southern California Law Review article and the Supreme Court's decision are reprinted or copied directly from their original pages. Footnotes appear on the pages to which they pertain.

The author, Christopher D. Stone, is holder of the Roy P. Crocker professorship at the University of Southern California Law Center, Los Angeles, California. **A 1962** graduate of Yale Law School, he has been on the faculty of the U.S.C. Law Center since **1965,** and has published various works on jurisprudence and other subjects.

23. Sweeney, Dennis M., and James J. Lyko, *Practice Manual for Social Security Claims.* New York City: Practising Law Institute, 1980. Pages: xv, 411. Price: **$35.00.** Publisher's address: Practising Law Institute, 810 Seventh Avenue, New York City, New York 10019.

With each passing year, more and more Americans are entitled to receive benefits administered by the Social Security Administration. The old age pension is probably the benefit most familiar to the public, but disability benefits are also very important. Indeed, the overwhelming majority of all disputed claims concern disability benefits, so these benefits are likely to be of greater interest to lawyers than are the old age benefits. The volume here noted explains the Social Security benefit system for the practicing attorney who advises claimants. The texts of applicable statutes and regula-

tions are set forth in extensive appendices, together with sample forms and other documents.

This work is organized in nine chapters, which fill the first half of the book. The introductory chapter leads the reader into chapters on entitlement to benefits, representation of claimants, and the first two levels of the claims process. Chapter 5 discusses prehearing preparation and development of a case for hearing. The sixth chapter discusses representation at the hearing. The remaining chapters concern appeals council review, judicial review, and a host of miscellaneous problems.

The four large appendices are an important part of the volume. Appendix A sets forth the relevant statutory provisions from Title **42,** United States Code. The second appendix does the same for various regulatory provisions in Title **20** of the Code of Federal Regulations. Appendix C provides samples of many Social Security forms, and a typical administrative law judge decision. The final appendix sets forth sample pleadings and briefs, and a client interview form.

For the use of readers, the book offers a preface, a detailed table of contents, a table of authorities cited, and a subject-matter index. Footnotes are frequently used, and are placed at the bottoms of the pages to which they pertain.

Both authors are attorneys with experience in representing claimants for Social Security benefits and supplemental security income. Dennis M. Sweeney is Special Assistant for Administrative Proceedings in the Office of the Maryland Attorney General. A **1971** graduate of the Georgetown University Law Center, he served as chief attorney of the Baltimore Legal Aid Bureau's Administrative Law Center from **1975** to **1979.** James J. Lyko, a graduate of the University of Maryland School of Law, is managing attorney at the Baltimore Legal Aid Bureau's Administrative Law Center.

24. Valle, James E., *Rocks & Shoals: Order and Discipline in the Old Navy 1800–1861.* Annapolis, Maryland: Naval Institute Press, **1980.** Pages: x, **341.** Price: **$18.95.** Publisher's address: Marketing Department, U.S. Naval Institute, Annapolis, Maryland **21402.**

This work of history, while not a law book, should be of great interest to anyone concerned with the history of American military

justice. Professor Valle, an historian, offers a fascinating account of crime and punishment in the "Old Navy," i.e., the U.S. Navy as it was before the Civil War. The author has chosen to designate the pre-Civil War navy as the "old navy" because, in his view, conditions of life and work have steadily, if slowly, improved in the U.S. Navy since that war.

It is hard to recognize in the old navy the origins of today's professional force, with its current complex system of military justice which applies in all the armed services. For example, flogging for very minor offenses was commonplace until that punishment was abolished in 1850. For another example, there were no career enlisted members as such; sailors signed on for specific voyages (typically three years in length) and were then released from service at the conclusion of the voyage. The author describes all this and much more, with citation to official records of the time.

The book is organized in ten chapters followed by two appendices. The first four chapters provide a description of the navy and its system of discipline in general. Chapters V through VIII discuss the prevalence and handling of various specific offenses, such as mutiny, desertion, "dishonor and disgrace," neglect of duty, drunkenness, and theft, among others. The two final chapters set forth a summary and conclusions for the preceding chapters. The first appendix consists of drawings of deck layouts for a typical warship of the time, and Appendix B contains the text of the Articles of War of 1800.

For the convenience of readers, the book offers a table of contents, an explanatory introduction, and a subject-matter index. Footnotes are collected together after the second appendix, and are numbered consecutively within each chapter separately. A bibliography and a glossary of technical and slang terms follows the notes.

The author, James E. Valle, is an assistant professor of history at Delaware State College. He has previously published a book on American railroading during World War II, *The Iron Horse at War*. A native of California, Professor Valle received his bachelor's degree from San Francisco State University, and his master's from University of California at Los Angeles, both in the mid-1960's. In 1968 he began teaching at Delaware State College, and in 1979 he received his doctorate from the University of Delaware.

INDEX FOR VOLUME 90

I. INTRODUCTION

This index follows the format of the vicennial cumulative index which was published as volume 81 of the *Military Law Review*. That index was continued in succeeding volumes. The next cumulative index will be volume 91 (winter 1981), covering writings published in volumes 75 through 90.

The purpose of one-volume indices is threefold. First, the subject-matter headings under which writings are classifiable are identified. Readers can then easily go to other one-volume indices in this series, or to the vicennial cumulative index, and discover what else has been published under the same headings. One area of imperfection in the vicennial cumulative index is that some of the indexed writings are not listed under as many different headings as they should be. To avoid this problem it would have been necessary to read every one of the approximately four hundred writings indexed therein. This was a practical impossibility. However, it presents no difficulty as regards new articles, indexed a few at a time as they are published.

Second, new subject-matter headings are easily added, volume by volume, as the need for them arises. An additional area of imperfection in the vicennial cumulative inclex is that there should be more headings.

Third, the volume indices are a means of starting the collection and organization of the entries which will eventually be used in volume 91 and other cumulative indices in the future. This will save much time and effort in the long term.

This index is organized in four parts, of which this introduction is the first. Part 11, below, is a list in alphabetical order of the names of all authors whose writings are published in this volume. Part III, the subject-matter index, is the heart of the entire index. This part opens with a list of subject-matter headings newly added in this volume. It is followed by the listing of articles in alphabetical order by title under the various subject headings. The subject matter index is followed by part IV, a list of all the writings in this volume in alphabetical order by title.

All titles are indexed in alphabetical order by first important word in the title, excluding *a*, *an*, and *the*.

In general, writings are listed under as many different subject-matter headings as possible. Assignment of writings to headings is based on the opinion of the editor and does not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any government agency.

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By Order of the Secretary of the Army:

E. C. MEYER
General, United States Army
Chief of Staff

Official:

J. C. PENNINGTON
Major General, United States Army
The Adjutant General

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Active Army: To be distributed to all active Army judge advocates and legal advisor offices.

ARNG & CSAR: None.